91-1341

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

Appendix 3 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VON HOAI, ET AL,:
PLAINTIFFS, : C A NO. 89-2397
V. : JUDGE OBERDORFER
THANH VAN VO, ET AL. :
DEFENDANTS. :

SUPPLEMENT TO THE MOTION FOR SANCTIONS ON BEHALF OF SUN REFINING AND MARKETING COMPANY

THE DEFENDANT FILED A MOTION FOR SANCTIONS ON DECEMBER 4, 1989, AND, BY ITS ORDER FILED OCTOBER 2, 1990, THIS COURT ISSUED A RULE TO SHOW CAUSE WHY MR. ELGIN AND MR. HEMENWAY SHOULD NOT BE SANCTIONED. THIS MOTION IS SET FOR ORAL ARGUMENT ON FEBRUARY 1, 1991.

COUNSEL FOR PLAINTIFFS HAVE NOW, BY THEIR RECENT ACTIONS, EXCEEDED THE BOUNDS OF DECENCY AND PROPRIETY. IN AN INTERVIEW PUBLISHED IN THE JANUARY 14, 1991 ISSUE OF U.S. OIL WEEK, A NATIONWIDE PUBLICATION ON TRENDS IN PETROLEUM MARKETING[1] BOTH COUNSEL MADE STATEMENTS WHICH ARE BLATANT

[1]Exhibit 1

LIES, WHICH WERE CALCULATED TO ADVANCE THEIR OWN INTERESTS AND SERIOUSLY DAMAGE SUN REFINING AND MARKETING COMPANY. JOHN HEMENWAY AND LAURENCE ELGIN MUST BE SANCTIONED BY THIS COURT PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

THE CIVIL RIGHTS CASE HAS BEEN DISMISSED. YET, THE ATTEMPT IS MADE TO BOLSTER THE PENDING 60(B) MOTION BY A FALSE CLAIM OF RACISM. THIS ENORMOUS DISTORTION IS AS FOLLOWS:

> "A former local Sunoco dealer is Meeting with groups representing the abundant Vietnamese community here to consider a boycott against Sun over alleged racism, Oil Week has learned."
>
> * * *
>
> Outside the courtroom, Jay Gordon Forester allegedly told Hoai's attorney John Hemenway that "all Vietnamese are liars."
>
> Forester hotly denies the story "Hemenway is not telling the truth," he said.

THE QUOTE, ATTRIBUTED TO COUNSEL, IS A TOTAL FABRICATION. IT IS DESIGNED TO DAMAGE SUN AND TO IMPAIR THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN SUN AND ITS COUNSEL. PUBLISHED DURING THE PENDENCY OF THE MOTION TO SET ASIDE THE JUDGMENT, COUNSEL NO DOUBT HOPES TO LEND SOME CREDENCE TO HIS SPECIOUS CLAIM OF DISCRIMINATION IN THE CIVIL RIGHTS COMPLAINT.

THE SECOND EXCERPT IS PRECEDED BY THE FOLLOWING CAPTION:

"DEALER: SUN AWARDS STATION TO VIETNAMESE CRIME FIGURE."

THE LEAD CONTINUES WITH:

> "In a case ignited by alleged links to organized crime, charges of racism and even death threats, a Washington, D.C. dealer faces down Sunoco this spring in a court battle."

THESE ARE NO MORE THAN BIZARRE ALLEGATIONS, EXISTING ONLY IN THE MALIGNANT MINDS OF HEMENWAY AND ELGIN. THERE IS NOT ONE SCINTILLA OF EVIDENCE OF "ORGANIZED CRIME,"; THERE ARE CHARGES OF RACISM, BUT

THERE IS NO EVIDENCE OF RACISM AND THE "DEATH THREATS," ARE UNSUPPORTED ALLEGATIONS BY HOAI, INFLAMED AND EXAGGERATED BY ELGIN AND HEMENWAY.

THE WILD CHARGES CONTINUE - AGAIN TOTALLY UNSUPPORTED - THAT "THANH VAN VO TURNED OUT TO BE INVOLVED IN A VITENAMESE ORGANIZED CRIME RING IN NORTHERN VIRGINIA..."

THE PLEADINGS OF PLAINTIFF COMPARE MR. VO TO AL CAPONE AND THEY CONTINUE WITH THE CHARGE, AD NAUSEAM, THAT HE IS A "MERE SCRAMBLER." THEY HAVE ACCUSED HIM OF PEJURY WITHOUT SUBSTANTIATION. THESE ARE ALL FANTASIES. THERE IS NO EVIDENTIARY SUPPORT FOR ANY OF THESE ALLEGATIONS. THE EVIDENCE IS CLEAR THAT THANH VAN VO FOUGHT FOR HIS COUNTRY AS A MAJOR IN THE AIR FORCE OF SOUTH VIETNAM; THAT HE WAS TRAINED AS A HELICOPTER PILOT BY THE U.S. ARMY; THAT HE IS A HARD WORKING NATURALIZED CITIZEN WHO SUPPORTS HIS WIFE AND

CHILDREN. MR. HOAI, TO THE CONTRARY, NEVER DEFENDED HIS COUNTRY AND, AS HE ADMITS, LEFT HIS CHILDREN BEHIND IN VIETNAM. HE NOW HAS FOUR MORE BY THE WIFE HE MARRIED IN THE UNITED STATES. HE IS UNWORTHY TO MAKE SUCH SLANDEROUS ALLEGATIONS AGAINST MR. VO.

THE CALUMNY CONTINUES WITH JOHN HEMENWAY ACCUSING SUN OF SUBORNATION OF PERJURY, IN THAT HE TOLD OIL WEEK "THAT HE BELIEVES SUN PUT PRESSURE ON DISTRICT REP ERNIE PEELE TO ALTER HIS STORY SUBTLY, AND THUS UNDERMINE HOAI'S CASE." THIS IS BOLSTERED BY A PARTIALLY CORRECT QUOTE FROM MR. PEELE'S DEPOSITION THAT "SUN'S LEGAL DEPARTMENT GAVE HIM SOME 'GUIDANCE AS TO HOW TO HANDLE THIS SITUATION (IN COURT).'"

THE ACTUAL TRANSCRIPT STATES AS FOLLOWS:

> Q. (BY MR. ELGIN) .. NOW GOING FORWARD TO THE TIME AFTER THE HEARING AGAIN, DID THERE COME A TIME WHEN YOU'RE (SIC) LEGAL DEPARTMENT FORBADE YOU TO COMMUNICATE FURTHER WITH MR. HOAI, OR MYSELF OR MR. HEMENWAY, OR

ANYBODY ON OUR SIDE OF THE MATTER?

A. I DON'T RECALL THAT. I'M SURE THAT I WAS GIVEN SOME GUIDANCE AS TO HOW TO HANDLE THIS SITUATION. (DEPOSITION OF ERNIE PEELE, JANUARY 5, 1988, PP. 54-55).

THIS IS A MCCARTHYISTIC TACTIC OF TAKING A HALF TRUTH, COUPLED WITH A LIE TO MAKE IT APPEAR TRUTHFUL.

LARRY ELGIN AND JOHN HEMENWAY HAVE SUNK TO NEW LOWS BY THEIR LIES AND DISTORTIONS. THIS IS NO LONGER AN ADVERSARIAL CONTEST, BASED ON FACTS AND LAW, WAGED IN COURT BY PROFESSIONALS LEARNED IN THEIR CRAFT WHO SEEK TO PERSUADE THE FINDER OF FACT THAT THEIR CAUSE IS JUST. THEY HAVE INSTEAD MOVED THEIR BATTLE TO THE STREETS AND THE BACK ALLEYS, RENEGADES ACTING OUTSIDE THE LAW,UTILIZING LIES, DISTORTIONS, INFLAMMATORY RACIAL EXHORTATIONS AND THE MEDIA TO SEEK A VICTORY AT ANY COST.

THIS COUNSEL IS NOT SO NAIVE AS TO BELIEVE THAT SANCTIONS WILL RESTRAIN THESE

LAWYERS AND THEIR OUTRAGEOUS TACTICS. YET, THE DIGNITY OF THIS COURT IS AT STAKE, AS THEY CONTINUE TO RUN AMUCK THROUGH ALL STANDARDS OF ETHICS AND PROFESSIONALISM.

THIS COURT IS IMPLORED TO REFLECT UPON THESE MONSTROUS ALLEGATIONS MADE BY HEMENWAY AND ELGIN IN THE TRADE PRESS. COUNSEL FOR DEFENDANT IS ALLEGED TO HAVE MADE A RACIST REMARK WHICH IS CATEGORICALLY DENIED. THEY ARE USING THIS LIE TO MOUNT A BOYCOTT AGAINST SUN, SEEKING ECONOMIC LEVERAGE AND SUPPORT FOR THE SPECIOUS CLAIM OF DISCRIMINATION. THEY SLANDER SUN BY CLAIMING THAT IT AWARDED A STATION TO A "VIETNAMESE CRIME FIGURE." THEY CHARGE THE DEFENDANT WITH SUBORNATION OF PEJURY ALLEGING THAT WE PRESSURED MR. PEELE TO "ALTER HIS STORY."

THIS CONDUCT CANNOT BE TOLERATED. IT MUST BE CENSURED. THESE MEN ARE NO LONGER WORTHY OF THE PROFESSION, AND, UNLESS THEY

ARE RESTRAINED AND SANCTIONED, THEY WILL CONTINUE THIS ABOMINABLE BEHAVIOR TO THE DETRIMENT OF THE ORDERLY ADMINISTRATION OF JUSTICE.

RESPECTFULLY SUBMITTED,

/S/ J. GORDON FORESTER, JR. #4424
GREENSTEIN, DELORME & LUCHS, P.C.
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WASHINGTON, D.C. 20036-2400
TELEPHONE: (202) 452-1400

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the matter of	:	
Thanh Vong Hoai	:	Civil Action No.
	:	
Plaintiff	:	87-2456-LFO
	:	
v.	:	
	:	
Sun Refining and	:	
Marketing Company,	:	
Inc.	:	
	:	
Defendant	:	

Tuesday
January 5, 1988

DEPOSITION OF:

ERNEST PEELE

* * *

Q. [By Mr. Elgin]: Now, do you recall -- I realize it's been some time now, but do you recall testifying about these matters in the Superior Court last year?

A. Yes I do.

Q. Have you had any opportunity to review that testimony since you gave it?

A. Yes.

Q. Do you still substantially agree with it today?

A. Yes, I do.

Q. In that case, it will probably eliminate a lot of the questions I would otherwise ask.

MR. FORESTER: Well, for the record, he was under oath then, he's under oath now.

MR. HEMENWAY: Why don't I introduce it into the record then, his deposition?

Q. Well, let me ask a few questions. In reviewing it, have you found anything at all in that testimony that you would feel might have been mistaken, or for whatever reason, you would wish to correct or clarify today? Or is it essentially stand by it all?"

A. As best I can remember, everything I said there would be basically what I would say today.

Q. Okay. Now, I wonder Mr. Forester, in order to cut down this time enormously, how many copies of this?

MR. FORESTER: I've got four. I've got enough.

Q. Four copies? Now, I would like to then submit that for the record, Mr. Recorder.

REPORTER: Exhibit 12.

Q. Exhibit 12. The testimony of Mr. Peele in the Superior Court proceeding.

* * *

C E R T I F I C A T E

This is to certify that the foregoing proceedings in the matter of: THE DEPOSITION OF ERNEST POOLE [SIC] held on: JANUARY 5, 1988 at the location of: 1323 RHODE ISLAND AVENUE, N.W., WASHINGTON, D.C. were duly recorded and accurately transcribed under my direction; further, that said proceedings are a true and accurate record of the testimony given by said witness; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was

taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.

/s/ NEAL R. GROSS

Notary Public/Reporter in and for

THE DISTRICT OF COLUMBIA

My commission expires

MARCH 31, 1989

NEAL R. GROSS

Court Reporters and Transcribers

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

THANH VAN VO,)

Plaintiff) DOCKET NO. CA-7075-86

v) August 29, 1986

THANH VONG HOAI,) [STAMP: Received Sep 19

et al,)'86, 2:44 PM/SCDC]

Defendants.)

The above-entitled matter came on for a hearing before the HONORABLE ANNICE WAGNER, Judge, in Courtroom Number 2100.

A P P E A R A N C E S

MILLARD OTTMAN, ESQUIRE, ATTORNEY

On Behalf of Plaintiff.

DAVID C. ROSEMAN, ESQUIRE, ATTORNEY

On Behalf of Plaintiff.

PHILIP DAVIDSON, ESQUIRE, ATTORNEY

On Behalf of Plaintiff.

JOHN HEMMENWAY [sic], ESQUIRE, ATTORNEY

On Behalf of the Defendant.

LAURENCE A. ELGIN, ATTORNEY

On Behalf of the Defendant.

* * * *

ERNEST L. PEELE,

having been called as a witness for and on behalf of the Defendant, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ELGIN

Q. Could you state your name for the record?

A. My name is Ernest L. Peel. [sic]

Q. Would you spell your last name for the Reporter?

A. P, as in Pennsylvania, e-e-l-e.

Q. And Mr. Peele, what is your employment?

A. I am a representative for Sun Oil Company, Sunoco.

Q. And in the capacity of a representative for Sun Oil Company how long have you been employed with that company?

A. 16 plus years, be 17 in October.

Q. 17 years in October. Now, what is the nature of your job? What do you do as a representative for Sun?

A. Well, I am the liaison between the dealer and the company and my functions range from interviewing dealers, on being a financial counselor and acting as the, I guess the go-between between the dealer and the company. So most of the business that is conducted with franchisee is done through me and the company.

Q. And in your work with the dealers, when do you first commence your relationship as a liaison between the dealer and the company?

A. Well, it depends if its a new deal or an existing dealer. If it's an existing dealer, I take over from whomever was there before me and we continue to do business from that point on. If it's a new dealer I am the guy that generally selects and interview that dealer and then put him in business.

Q. Now, you are the one that selects and interviews the dealers for the Washington, D.C. area?

A. Washington, D.C. and Northern Virginia.

Q. Northern Virginia. Now, in that capacity, did you select a dealer for a station on Pennsylvania Avenue, South East?

A. Yes, I did.

Q. And how do you designate that station? What do you call that station?

A. Sun Station at 2305 Pennsylvania Avenue.

Q. South East.

A. South East.

Q. Now, are you familiar with the gentlemen, the two gentlemen in this room, Mr. Hoai, who has been identified on the record and Mr. Vo?

A. Yes, I am familiar with both.

Q. Now, is either of these gentlemen a dealer with whom you have dealt on behalf of Sun Oil?

A. Yes. Mr. Hoai is our dealer who has a contract with us, with Sun Oil Company.

Q. So Mr. Hoai is a dealer?

A. That's correct.

Q. And Mr. Vo is not.

A. No.

MR. OTTMAN: Excuse me, your Honor, could we avoid counsel repeating every statement of testimony.

THE COURT: I'll sustain the objection.

MR. ELGIN: All right, your Honor, I just wanted to avoid any charges of leading the witness.

Q. Now, could you describe briefly your taking on Mr. Hoai as a dealer?

A. Well, in the process that this station was closed and I advertised and I interviewed a lot of people. And Mr. Hoai, I interviewed him. Mr. Hoai, I knew him previously because he was an employee for Sun Oil Company before, he was a former dealer with Sun Oil Company. And I had not been his representative, but there was a couple of other people who had. And he was highly recommended by my peers and who had been a very good dealer with us. So I selected him as the dealer. And as a result of that selection process, is that it's an interview, several interviews, how are we going to run a business, do you have capital to go into the business and this the type interview that I carry on.

Q. Now, when you interviewed him, did you-- what do you check when you interview him? What did you check out when you interviewed him? What factors were important in making your decision?

A. Well, number one, he had a history with us, number one as being an operator and one who knows the business. The second and probably important, it is very important that the person has ample capital to operate a service station. And when I say that, I mean that I will give him an application and he fills out an application, and then I have my credit department run a check on that application, and with the financial information that is given we then make our decision as to accept or not accept.

Q. What kind of capital did Mr. Hoai have?

A. Initially when I talked to Mr. Hoai, I told him what was needed to enter into the

business, which was somewhere between 65 and $70,000. Mr. Hoai told me that he had about thirty thousand of his own money, 30, $35,000 of his own money and he had a friend who was loaning him the additional capital to go into the business.

Q. Did he mention the name of that friend to you?

A. Yes, that was Mr. Van Vo, whom I met.

Q. You met with Mr. Van Vo. And what did Mr. Hoai and Mr. Van Vo tell you about Mr. Van Vo's role in this dealership?

A. Well, I questioned both of them extensively about that and one of my questions to Mr. Hoai, this loan, first I wanted to know the pay back arrangements of the loan because that can impact the business in that the loan was made in a way that Mr. Hoai would have ample time to pay it back, it wasn't a loan that I'll give you today and I need my money back six months from today because businesses

just don't function that well. But the whole crux of that conversation was that Mr. Vo was loaning Van (sic) the money as a friend who was helping him get into the business and that that loan was to be paid back, start principle, was to be paid back after the first year of business. During the first year only the principle would be paid -- excuse me, not principle, interest would be paid during that period. Sounded like a very good deal from the standpoint that they were friends and he wanted to help Mr. Hoai get back in business, and that was it. I also questioned both of them in saying now, this loan is straight up, there is no behind the scene partnership, okay, ownership of this money being invested or being loaned, and the answer was unequivocally, no. Find. I don't have any problems with that.

Q. So based on that you went ahead and granted the distributorship?

A. I granted the franchise.

Q. Franchise.

A. To Mr. Hoai.

Q. And once the franchise was set up, did you then regularly see both gentlemen in the business?

A. At first Mr. Hoai was there and then about I guess there was a two, three week period after the business opened and we were scheduled to open April 1, but we got some delays in there, I don't know whether it was in the contract form or something came up, officially we opened on April 10th, and Mr. Hoai was there. And about three weeks or a month, maybe a month, five weeks, I'm not sure, Mr. Hoai was there. And then Mr. Hoai wasn't there and I got concerned about his absence and I said where is Mr. Hoai, and this is to Mr. Van. Van Vo. And he was saying that Mr. Hoai had gone to see his sick brother in West Virginia or something. Well, that's

understandable. The thing was that it got a little longer and I said I am not being told or this game isn't being played right, Hoai is supposed to be here. And we have a clause in our contract where personal supervision of the person that I've given the contract to should be there. And that's why I finally got back in touch with Hoai and I called his home and they told me he was out of town, well, that was fine. And when he did get back, I told him, I said hey, you know, you are supposed to be at the station. I've seen Van there, and I've talked to Van. Well, didn't matter to me because they were such good friends and with his loaning him the money. Fine. Okay, you're still helping your fellow countryman, I suppose.

At that point, you know, when I finally got and sort of talked to Mr. Hoai, he was saying that Van was putting him out of the station. I said he can't put you out

of the station. How is he going to do that? You know. I said you are the dealer and I talked to Van and I've always said look -- he said well, why won't he sell me the business, I said well he can't sell you the business unless he comes through us. And I want to tell you and tell Hoai, that Hoai you've got to be here. Mr. Vo, you know, I don't care what the problem is between you and Mr. Hoai, you two have to settle that. But with Sun Oil Company, Hoai is my dealer. And I told him that several times. And in fact I even had my manager down and we talked with Van and this has been going on for some time and that Van, we do not recognize you., Hoai is the dealer, now you two please work this thing out.

Q. Did they ever work it out?

A. Evidently they didn't, we're sitting here.

Q. Was there ever a time that you and your company or your manager or anybody connected with Sun Oil Company recognize Mr. Van Vo in any way as being a franchisee or dealer of the Sun Oil Company?

A. We have not.

Q. Now, in this station that we're speaking of, the station property itself is owned by the Sun Oil Company, is it not?

A. That's correct.

Q. Did you ever in any way recognize Mr. Van Vo as being the lessee of the property?

A. No.

Q. Do you allow someone to sublease a property lease from you without notice to the Sun Oil Company?

A. No, that is a violation of the contract. If a dealer wants to sell his business, it is in the contract he has that right but with the proviso that we, as a company have got the right to reject

or accept the new buyer, okay, and the present lessee must give us something in writing saying that he is negotiating to sell his business to give us an opportunity to interview and go through the normal channels of accepting a dealer.

Q. Now, so there is the franchise to distribute the petroleum products and there is the lease, those are two separate things, is that right?

A. Well, the lease itself is incumbent upon the fact that it's a total business there, and the product because it is a branded product, they must sell our product, gasoline.

Q. Now, is there anything other than the franchise to sell your product and the lease that comprises the business of a Sunoco station? Is there anything other than those two things?

A. Would you repeat that question? I am not sure I understand that you're --

Q. Well, is there anything to the business other than the lease and the franchise to distribute the Sun Oil Products, that's the whole business, right, those two things?

A. That's the business.

MR. ELGIN: I have no further questions of this witness at this time, your Honor, in deference to your Honor's admonition.

PEELE -CROSS

THE COURT: You may inquire.

Do you have any questions?

MR. ROSEMAN

Q. Mr. Peele, after the station opened on April 10, did there come a time when you told Mr. Vo that you discovered a shortage in the inventory, that you had done at the time the station closed in January?

A. Right. What happened there was the inventory from the previous --

Q. Excuse me.

THE COURT: You've answered the question.

Q. Please just answer my questions.

A. Okay.

Q. Thank you. And did you tell Mr. Vo that there may have been a mistake when you did the inventory and that you were concerned you might have to personally make it up with Sunoco?

A. No, this was to Mr. Hoai.

Q. Okay, did you tell that to Mr. Hoai?

A. Yes.

Q. Was that on April 10?

A. When did I write that out, it could have been April 10. April 9th, I think I might have a copy of when I actually wrote up the invoice on the ground inventories that were there and inventories on hand.

Q. Did you ask Mr. Hoai or Mr. Vo if they would make up the difference for you with a check?

A. No.

Q. Did there come a time on April 10 when you received a check from Mr. Vo in the amount of the inventory shortage. $1458.00?

A. The inventory that was there was from the previous owner. And what I had done is given the previous owner credit and I said, Mr. Hoai, I know this -- the inventory was here, I think there was a break in and some of the products might be gone. And I said, I'll tell you what, to keep the accounting at bay, I will just invoice you for the product that I gave him credit for and I said now we'll make up this to you, I don't care whether it's short or there or not. I had originally gotten an amendment to the lease for $2500, I said I'll give it to you for $2000 and I said that will cover anything. I said you've got to make out on the deal.

THE COURT: Does that answer your question whether he's given a check?

MR. ROSEMAN: I'm sorry, your Honor, it doesn't.

THE WITNESS: Well, the check was given to me for the product that I billed him for, which was the inventory on hand.

MR. ROSEMAN: Your Honor, I don't know what the protocol here is in chambers, but I would like to show the check to Mr. Peele and ask if he can identify it.

THE COURT: All right.

A. Again the check was fourteen sixty-eight and some change.

Q. Well, perhaps we can avoid marking it then if you remember the check clearly.

A. That's right.

Q. Do you remember who signed the check?

A. I'm not sure whether it was Hoai or Vo. I'm -- I know I got the check.

Q. Do you remember who physically handed it to you? Wasn't it Mr. Vo who handed you the check?

A. Could have. I don't know.

Q. Now, during the operation of the station through the spring and the summer, you personally collected the rent from the premises, didn't you?

A. The first check was given to me in the form of a cashier's check for $2,000. From that point on we have what we call an electronic rent draft check that is set up by the bank and our bank, and the dealer signs the form which means that money for rent is automatically electronically transferred from their account to our account.

Q. Is that the procedure that was used at the 23rd and Pennsylvania Avenue station?

A. Yes. I got the first check, as I said for 2000, okay, it was a certified check. And then the rent draft, as we call it, from that point on the rent was being taken out automatically from the account that Mr. Hoai signed the papers for, giving us authorization to do it.

Q. Now, you say the rent was being taken out of an account automatically pursuant to a rent draft from the dealer.

A. From the dealer.

Q. And that money was being drawn on the account of the person you recognized as the dealer?

A. That's correct. Mr. Hoai had to sign the rent draft form that we get a copy of and send to the bank.

Q. Are you aware of where the account was located, from where those payments were made?

A. They were coming out of a bank out of Virginia, I believe.

Q. Would that have been the McLean Bank (phonetic).

A. Is that it? I'm not sure. All I know is when they give me a (indiscernible) check that will put this rent draft in the process and Hoai is the person who signed that rent draft form, then it is, by my

credit department, from that point on it is done electronically.

Q. Well, are you aware that the owner of that checking account, McLean Bank, is Mr. Vo? Did there come a time when you became aware of that?

A. Not really, because the original monies that were put into the business, the $7000, $2000 rent, the $5000 was given to me from Mr. Vo, but at that time, it still was, to me, okay, and the understanding was that this was monies that Vo was loaning to Hoai. So, you know, it didn't -- I mean this was an established fact that he was loaning him the money so I didn't have any reason to question the fact that the money was coming from Vo simply because they both had told me that he was loaning him money.

Q. Did there come a time when Mr. Vo told you that he had purchased the business from Mr. Hoai

A. He told me that he had given Hoai some money for the business, and I said well, you know, Hoai just can't sell you the business, it's got to come through me before we can make any transfer of business.

Q. Well, he showed you a document that was called a contract of sale of business, didn't he?

A. He did. That was one for $1.00. I think, a contract, somewhere I saw something about Hoai turning the business over to Vo for $1.00, and I said but Hoai still can't do that. My contract says, hey, you have to come through me. He just can't sell his business to anybody. I said --

Q. Well, did you explain to Mr. Vo that what you were speaking of was approval of Sunoco, the approval of the transfer?

MR. OTTMAN [sic]: Your Honor, counsel is testifying, let him ask the question.

THE COURT: Your objection is overruled, he can lead witness if he wishes to on cross. Go ahead, please.

THE WITNESS: Repeat the question, please.

Q. When you were speaking with Mr. Vo about this, isn't what you were telling him that Sunoco had to approve the transfer, not that Sunoco had to make the transfer, isn't that what you meant?

A. Well, yes, we do have to make the -- we have to approve the transfer, right, and until we do that we don't recognize it.

Q. I see. But the dealer, franchise agreement itself, would permit the transfer of the dealership or the reassignment of the dealership, it's just that Sunoco must approve it.

A. Provided that we are told that we get in writing from the dealer that he is in the process of selling his business or

transferring it, and with the proviso that the new person is acceptable to Sun Oil Company.

Q. What you really needed with them were two things, you needed Mr.Hoai to initiate this approval process as the person who signed the dealer agreement with you, and then you needed to satisfy yourselves of the credit worthiness of the new dealer. Is that right?

A. Hm-hm

THE COURT: I am sorry, what was the answer?

THE WITNESS: Yes. Yes.

Q. Now, did you have any reason to believe that Hoai -- that Mr. Vo would not be credit worthy to Sunoco?

A. No.

Q. In fact, you knew that Mr. Vo at the very least, had provided all of the funds for the operation of the station at that time, didn't you?

A. Not totally. I knew --

Q. I'm sorry.

A. Pardon?

I new from what they were telling me that Vo was loaning Hoai something in the nature of 35 to $40,000. Now, this is what Van Vo and Mr. Hoai told me initially when I was interviewing Mr. Hoai.

Q. You are the person upon whom Sunoco relies to make a decision as to the credit worthiness, the desirability of the dealer to operate the station?

A. The credit worthiness is done through my credit department. That's why I need an application on an individual, and they handle that function. It is my responsibility to interview the individual, to try to come to some decision on certain that the person has -- or business background to operate a business.

Q. All right, well, would it be fair to say that you were satisfied that Mr. Vo

was at least, as to the second requirement that you identified, was credit worthy and satisfied that requirement to be a dealer.

A. Well, I don't know that, because I didn't have a credit check on him.

Q. Okay. So as far as your input in determining whether a dealer receives a franchise agreement, were you satisfied that Mr. Hoai,(sic) apart from the credit check, that Mr. Vo was qualified to operate that station as a dealer?

A. Well, I think he was qualified with one proviso in there that I knew that he was involved in a lot of other things and we look for people who are going to be specifically operators of that particular location. Now, it's not to say that I would totally discount anyone, but anyone who does not have time to be there and operate the station, that is why I would not select them.

Q. Well, you testified earlier though, that Mr. Vo was the one at the premises whenever you went by and that you in fact became concerned that Mr. Hoai was never there.

A. That's correct.

Q. So you knew that Mr. Vo was the one who was at the station, certainly of the two of them.

A. Yes, I knew that. But I also know that Mr. Vo is involved in a lot of other businesses and he has another service station somewhere. Texaco.

Q. Is that right? Do you know that for a fact?

A. Well, that's what he told me. I'm talking about Vo told me this.

Q. Now, did there come a time when you told Mr. Vo that as far as you were concerned, he could be the dealer to the station as long as Sunoco approved it and

they went through the formalities of having the transfer.

A. I probably could have said that.

Q. And in fact you said that after you saw the purchase agreement, this contract that you mentioned a little bit earlier, is that right?

A. I could have. I don't remember in detail. I don't recall specifically saying that from the standpoint of say looking at the contract and giving him an answer to that, no, I -- you know.

Q. Okay, did you tell Mr. Vo that what was really necessary at this stage, in fact the only thing that was necessary was for Mr. Hoai to make the initiated request and start the process?

A. I said in order for him, and I don't recall exactly, that in order for Mr. Vo to be considered for a dealership, would be for Mr. Hoai to initiate and give us the paper work necessary.

Q. Mr. Vo asked you for help in getting Mr. Hoai to do that, didn't he?

A. Well, he probably could have and I kept seeing -- Mr. Hoai was telling me that Van was like forcing him out of the station and my question to Hoai was, do you want the station? Yes. I said well, you're the dealer. Now, that problem exists between you and Van, and I can't make that decision as to who, you know, it's going to be. I can't go there and tell Van to leave, or I can't tell you to tell Van to go down the road.

MR. HEMENWAY [SIC]: Thank you, Mr. Peele, I have nothing further.

MR. ELGIN:

Q. Mr. Peele, you mentioned that Mr. Van Vo told you about other businesses he owned. What were they? What were these other businesses he told you about?

A. Well, I think he owns a service station, a Texaco Service Station, and I know

he owns a vending, a number of trucks with vending.

Q. That would be coin vending machine operations?

A. Oh, stands that you see on the street, you know, hot dogs, selling novelties, that type.

Q. And this other service station he owns, did he tell you what company that was with?

A. Texaco, I believe.

Q. You normally give Sun distributorships for franchises to people who own rival businesses with other oil companies?

A. I have done it, we try to keep it to a limit, but you know, it's done.

Q. It's something you do very carefully though.

MR. OTTMAN: Objection, leading.

THE COURT: Sustained.

MR. ELGIN: Well, your Honor, they asked leading questions up and down. When

I objected to it, my objection was overruled.

THE COURT: Counsel, this is your witness called on direct, you may not lead him, the opposing side on cross examination surely you know, after this many years of practice, that they can. Those are the rules.

Proceed.

MR. ELGIN: All right.

Q. What process do you go through when someone asks to have a Sun distributorship and they also own a distributorship or franchise for another company?

A. Well, I give them the same consideration I would do anyone who does not have another business, I probably would try to go look at the other operation to see how they operate that, that would give me some idea as to how they are going to operate my business.

Q. In this case though, you never reached that stage?

A. I didn't have any reason to.

Q. Now,I just want to understood [sic] the answer you gave to opposing counsel on one question and that is the answer you gave when he asked you about account at the McLean Bank. It was the McLean Bank did you answer it was McLean Bank or --

A. From looking at the check, I think it was McLean Bank.

Q. And the -- opposing counsel asked you if you knew that account was the account of Mr. Van Vo rather than Mr. Hoai, and I didn't quite get the answer to that.

A. I said I wasn't sure. All I know is that account when we have our rent draft on it, it was signed by Mr. Hoai, so who has control of that account somehwere --

Q. You didn't know.

A. I don't know.

Q. You didn't know. As far as you knew it was being paid by Mr. Hoai?

MR. OTTMAN: Objection, leading.

THE COURT: Counsel, don't lead the witness. Rephrase your question.

MR. ELGIN: I'm sorry, your Honor.

Q. All right, let me rephrase the question. Did you have any knowledge of anyone other than Mr. Hoai controlling that account?

A. No, I do not. I did not.

MR. ELGIN: No further questions on redirect, your Honor.

THE COURT: Sir, could you tell me the date on which you were made aware of the agreement between Mr. Hoai and Mr. Vo, the written agreement? The approximate date, month?

THE WITNESS: That -- gosh, this is really -- when was the date -- Mr. Hoai had another attorney and we met at the

station, and I don't know, I think it was in June sometime, that was when someone came up and said Hoai had ---

THE COURT: Well, you don't have to tell me that, all I wanted to know was the date on which you think you learned about the agreement.

THE WITNESS: Sometime in June, your Honor.

THE COURT: Of this year.

Did you see a copy of that document?

THE WITNESS: It was in Vietnamese and I --

THE COURT: You say a copy of the document in Vietnamese?

THE WITNESS: Right. And I can't say what it was.

THE COURT: Was both - who was present when you saw that document?

THE WITNESS: Mr. Van Vo, Mr. Hoai, Ms. Solene (phonetic) --

THE COURT: Did Mr. Hoai or Mr. Vo tell you what the document purported to be?

THE WITNESS: Verbally that --

THE COURT: Who told you what between these two?

THE WITNESS: It would be Mr. Vo.

THE COURT: What did he say?

THE WITNESS: That Hoai had signed this document giving him the business.

THE COURT: And what did Mr.Hoai say?

THE WITNESS: Well, the amount was like for a dollar and Mr. Hoai said he was forced to sign this paper.

THE COURT: That's what Hoai told you?

THE WITNESS: Standing there, the four of us.

THE COURT: Were you on the premises much? How often were you on the premises?

THE WITNESS: Initially, quite often. Maybe twice a week and after maybe once a week and after that maybe two weeks.

THE COURT: And each time you went there, who did you see in charge?

THE WITNESS: As I say the first four to five weeks, Hoai was around. Then all of a sudden, Hoai was missing and after I finally got back in touch with Mr. Hoai, up to that point, Mr. Hoai was saying that if he goes back there he was afraid of his life or something, and he just wasn't there, Van was there.

THE COURT: Was Van there each time you went?

THE WITNESS: He was either there or you could call him on the telephone and get him there. Normally I would try to make an appointment or get somebody on the telephone if I wanted to communicate with them.

THE COURT: Do you know whether this business had a license from the Government?

THE WITNESS: It was on the wall.

THE COURT: Did you know whose name the license was in?

THE WITNESS: There was one that was Sonntag (sic), initially there was some with Mr. Hoai's name on it, and then that changed.

THE COURT: It's your contention that Mr. Hoai had a license to operate this business?

THE WITNESS: Yes.

THE COURT: And then you say it changed.

THE WITNESS: Then I saw Sonntag --

THE COURT: When did that occur?

THE WITNESS: This had to be after that month or five weeks after the disappearance of Mr. Hoai here.

THE COURT: Can you tell me approximately what month that was in?

THE WITNESS: That had to be in May.

THE COURT: Does the company become involved with whether or not the fran-

chisee have licenses? Are you concerned about that?

THE WITNESS: Yes.

THE COURT: Did you do any investigation when you ascertained that the license was not in the name of Hoai?

THE WITNESS: Well, with the initial license --

THE COURT: The question is whether in May of 1986, when you found out that Sonntag became the person holding the D.C. License, whether or not the person to whom you gave the franchise had an appropriate license.

THE WITNESS: No, I did not investigate that.

THE COURT: All right.

Are there any questions as a result of the Court's questions?

MR. ELGIN: Yes, your Honor. Do you want to go first?

MR.HEMENWAY: Yes.

THE COURT: All right. Well, why don't you go first because then I'll give you the last word since it's your witness.

FURTHER DIRECT EXAMINATION BY MR. ELGIN

MR. ELGIN: He said something so quickly there that he -- he said afraid for his life. Could we clarify what he was talking about, what he said?

Q. He said he was afraid for his life?

A. The conversation with Mr. Hoai and he had another attorney by the name of Solene (phonetic), and I went to lunch with them, and when I say Hoai, it's your business, you should be there, and he says, well, if I go back there, you know, something might happen to me, somebody might break my arm or my leg or whatever, that kind of conversation came to me and I -- I didn't know what to say at the time that point. He was saying something about cowboys and I said cowboys, what cowboys? And evidently it must mean that someone within

the Vietnamese community kind of controls. That was my interpretation of it. It doesn't have to be but at least that's what I thought.

MR. OTTMAN: If the Court please, could we strike all this testimony --

THE COURT: I'll strike his interpretation.

MR. ELGIN: Well, wait a minute, he said that they were talking about violence, breaking legs --

THE COURT: Sir, I heard what he said, I'm striking what he said his interpretation was. I'm letting his answer to your question stand.

MR. ELGIN: I understand. I just want to be clear on that, your Honor.

Q. They were actually talking about physical violence in front of you?

A. Yes. That if he came back on the premises there was going to be physical harm.

MR. ELGIN: I have no further questions, your Honor.

THE COURT: Anything further you wish to ask?

MR. OTTMAN: Yes, this statement about physical harm.

FURTHER RECROSS EXAMINATION BY MR.ROSEMAN:

Q. What was the day or the month that that statement was heard, could you tell us again?

A. Sir, I couldn't tell you, I had so many meetings and chronologically, to give you an exact time or date, I don't know.

THE COURT: If you don't know, sir, you may simply say you don't know. You don't have to go into long details.

Q. Would you know if it was in May or in June or July?

A., As I said, it had to be either the latter part of May or June.

Q. Did Mr. Hoai say if he had gone to the police to do anything about these alleged threats on his life?

A. No, he did not. In fact, I suggested that he do that.

Q. Asking about the business license now. You said that you saw a business license at the station in the name of Mr. Hoai? Did you --

THE COURT: You have to respond to that orally so we can pick up your words.

THE WITNESS: Yes. Yes. I'm sorry.

Q. Where was this license when you saw it?

A. It was on the wall in the sales office.

Q. Did you look at it closely to ascertain the exact name on the license?

A. No.

Q. Well, are you certain that it was Mr. Hoai's name on the license and not Mr. Vo's name.

A. I can't be exactly sure on that.

Q. So you are not able to say for certain that you saw a business license at the station in Mr. Hoai's name?

A. To be definite, no.

Q. It could have been Mr. Vo's name.

A.. It could have been, but I certainly knew that we have a retail sales tax number that we require from our franchisee and that number was given to me and that should be in your record because we have that.

MR. ROSEMAN: Nothing further, your Honor.

THE COURT: Anything further?

MR. ELGIN: Nothing, your Honor.

THE COURT: Thank you, sir, you may be excused.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VAN VO,
D/B/A SUNTECH SUNOCO, INC.,
PLAINTIFF, CA NO. 7075-86
V.
THANH VONG HOAI
JOHN D. HEMENWAY,
DAVID HEMENWAY
AND SUN REFIING AND
MARKETING CO.,
DEFENDANTS.

TEMPORARY RESTRAINING ORDER

THIS MATTER IS BEFORE THE COURT ON THE MOTION OF PLAINTIFF,THANH VAN VO, DOING BUSINESS AS SUNTECH SUNOCO, INC. (HEREINAFTER "PLAINTIFF"), REQUESTING ISSUANE OF A TEMPORARY RESTRAINING ORDER.

UPON CONSIDERATION OF PLAINTIFF'S VERIFIED COMPLAINT, THE EXHIBITS THERETO, THE AFFIDAVITS, AND THE MOTION FOR A TEMPORARY RESTRAINING ORDER, TOGETHER WITH THE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, AND AFTER HEARING TESTIMONY AND ARGUMENTS AND REPRESENTATIONS OF COUNSEL, IT APPEARING THAT PLAINTIFF HAS MET HIS BURDEN OF SHOWING

(1) THAT PLAINTIFF HAS MADE A STRONG SHOWING THAT HE IS LIKELY TO PREVAIL ON THE MERITS; (2) THAT PLAINTIFF WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF; (3) THAT DEFENDANTS WILL NOT BE SUBSTANTIALLY HARMED BY THE GRANT OF A PRELIMINARY INJUNCTION; AND (4) THAT THE PUBLIC INTEREST IS SERVED BY THE GRANT OF A PRELIMINARY INJUNCTION FOR THE REASONS STATED ON THE RECORD, WHICH ARE INCORPORATED HEREIN BY REFERENCE A TEMPORARY RESTRAINING ORDER SHOULD BE ISSUED TO PRESERVE THE RIGHTS OF THE PARTIES AND RESTORE THE STATUS QUO ANTE.

IT IS HEREBY ORDERED:

(1) THE DEFENDANTS JOHN HEMENWAY, DAVID HEMENWAY, THANH VON HOAI AND ALL PERSONS IN ACTIVE CONCERT OR PARTICIPATING WITH THEM SHALL IMMEDIATELY:

(A) CEASE AND DESIST FROM SELLING ANY PETROLEUM PRODUCTS, AUTO PARTS OR OTHER GOODS, PERFORMING ANY MECHANICAL OR OTHER

SERVICES, OR TRANSACTING ANY OTHER BUSINESS ON THE PREMISES OF THE SUNOCO STATION LOCATED AT 2305 PENNSYLVANIA AVENUE, S.E., WASHINGTON, D.C. 20020 (THE "STATION")

(B) RETURN POSSESSION AND OCCUPANCY OF THE STATION AND THE PROPERTY THEREON TO THE PLAINTIFF, AND

(C) CEASE THEIR INTERFERENCE WITH THE CONDUCT OF PLAINTIFFS BUSINESS AT THE SAID STATION.

(2) THAT THE DEFENDANT, SUN REFINING AND MARKETING COMPANY, SHALL CONTINUE TO SUPPLY THE PLAINTIFF WITH THE BRANDED PETROLEUM PRODUCTS AND TO PERMIT PLAINTIFF TO OPERATE THE STATION AND TO PERMIT HIM TO OCUPY THE STATION UNDER THE SAME TERMS AND CONDITIONS AS EXISTED BETWEEN PLAINTIFF AND SUN REFINING AND MARKETING COMPANY PRIOR TO AUGUST 25, 1986 AND PRODUCTS ARE TO BE DELIVERED SO LONG AS PLAINTIFF PAYS THE SUMS DUE FOR SAME.

THAT, AS A CONDITION OF GRANTING THIS TEMPORARY RESTRAINING ORDER, PLAINTIFF SHALL POST BOND IN THE AMOUNT OF $3,000 BY AUGUST 29, 1986, EASTERN STANDARD TIME WHICH AMOUNT SHALL REMAIN IN THE REGISTRY OF THE COURT UNTIL FURTHER ORDER OF THIS COURT.

THIS TEMPORARY RESTRAINING ORDER SHALL CONTINUE IN EFFECT ON SEPTEMER 8, 1986, UNLESS MODIFIED OR EXTENDED BY PRIOR ORDER OF THIS COURT

ORDERED THIS 29TH DAY OF AUGUST, 1986 AT 5:25 PM O'CLOCK, P.M.

/S/

ANNICE WAGNER

JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VAN VO, d/b/a SUNTECH SUNOCO, INC., et al., Plaintiffs,	)	
V.	)	CA 7075-86
THANH VONG HOAI, et al. Defendants.	)	

CONSENT ORDER FOR EXTENSION OF TEMPORARY RESTRAINING ORDER AS TO DEFENDANT SUN REFINING AND MARKETING CO.

This matter having come before the court upon the pleadings and other papers heretofore filed herein and upon the representations of counsel and it appearing to the court that on August 29, 1986, a Temporary Restraining Order was issued in this cause on motion of plaintiff, Thanh Van Vo, after the hearing of testimony and arguments of counsel; and it further appearing that the plaintiff and Sun Refining and Marketing Company have, as evidenced by the endorsements hereon by counsel, agreed that the terms and conditions of the Temporary Restraining Order should be con-

tinued with respect to plaintiff and defendant Sun Refining and Marketing Company, until March 31, 1987 or the prior resolution of the dispute between plaintiff and defendant Thanh Vong Hoai over rights to operate the gasoline station at 2305 Pennsylvania Avenue, S.E., Washington, D.C. as a franchisee and lessee of Sun Refining and Marketing Company, so long as plaintiff complies with the terms and conditions of that certain one-year dealer trial franchise agreement appearing as Exhibit 1 to the Verified Complaint as if he were an original signatory thereto. A non-renewal of said agreement or a termination for failure to comply with the terms and conditions thereof will not be deemed a violation of this consent order. It is by the Court this 8th day of September, 1986,

ORDERED, that the following paragraph (2) of the Temporary Restraining Order of Au-

gust 29, 1986 is hereby extended as to the plaintiff and the defendant, Sun Refining and Marketing Company, so as to continue to maintain the status quo as between plaintiff and defendant Sun Refining and Marketing Company:

> (2) that the defendant, Sun Refining and Marketing Company, shall continue to supply the plaintiff with the branded petroleum products and to permit plaintiff to operate the station and to permit him to occupy the station under the same terms and conditions as existed between plaintiff and Sun Refining and Marketing Company prior to August 25, 1986. Such products are to be delivered so long as plaintiff pays the sums due for same.

and it is further ordered, that this extension shall continue until further order of this court or until March 31, 1987 or the prior resolution of the dispute pending in this cause between the plaintiff and defendant, Thanh Vong Hoai, over rights to operate the gasoline station at 2305 Pennsylvania Avenue, S.E., Washing-

ton, D.C., as a franchisee and lessee of Sun Refining and Marketing Company and so long as plaintiff continues to comply with the terms and conditions of that certain one-year dealer trial franchise agreement appearing as Exhibit 1 to the Verified Complaint as if it were an original signatory thereto, it being the sense of this consent order that a non-renewal of said agreement or a termination for failure to comply with the terms and conditions hereof will not be deemed a violation of this Consent Order;

AND IT IS FURTHER ORDERED, that a copy of said restraining order, together with a transcript of the court's reasons therefor stated on the record and incorporated into the temporary restraining order by refernce is attached to and made a part of this Consent Order;

AND IT IS FURTHER ORDERED, that the cash bond posted by plaintiff in the amount of

$3,000 shall remain in effect for the duration of the restraining order or until further order of the court.

This consent order shall not be construed to extend the said restraining order as to any other defendant.

/s/ Stephen F. Eilperin

Judge [stamp] 'Signed in Chambers'

Seen and agreed:

/s/ David C. Roseman per mfo
D.C. Bar No 226969
Jones, Day, Reavis & Pogue
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Attorney for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
PLAINTIFF,	:	C A NO. 87-2456
V.	:	
SUN REFINING AND	:	JUDGE OBERDORFER
MARKETING COMPANY,	:	
DEFENDANT.	:	

AFFIDAVIT OF JEFFREY W. WAGNER

STATE OF OKLAHOMA)
COUNTY OF TULSA)

I, JEFFREY W. WAGNER, BEING FIRST DULY SWORN ON OATH, DO DEPOSE AND STATE AS FOLLOWS:

1. I AM CURRENTLY A SENIOR ATTORNEY FOR SUN PIPE LINE COMPANY IN TULSA, OKLAHOMA. IN SEPTEMBER, 1986 I WAS COUNSEL TO THE FUELS DIVISION OF SUN REFINING AND MARKETING COMPANY LOCATED IN PHILADELPHIA, PENNSYLVANIA.

2. ON OR ABOUT SEPTEMBER 5, 1986, I WAS CONTACTED BY DAVID C. ROSEMAN, AN ATTORNEY WITH JONES, DAY, REAVIS & POGUE, WHO REPRESENTED THAN VAN VO IN A SUIT FILED AGAINST THANH VONG HOAI AND SUN REFINING AND MARKETING COMPANY IN THE SUPERIOR COURT

OF THE DISTRICT OF COLUMBIA. I CANNOT RECALL WHETHER THIS TELEPHONE CONVERSATION WAS MY FIRST NOTIFICATION OF THE SUIT. I DO KNOW, HOWEVER, THAT LOCAL COUNSEL HAD NOT BEEN RETAINED TO REPRESENT SUN REFINING AND MARKETING COMPANY IN THIS MATTER PRIOR TO THIS DATE.

3. DAVID ROSEMAN INFORMED ME THAT A TEMPORARY RESTRAINING ORDER HAD BEEN GRANTED BY JUDGE ANNICE WAGNER REINSTATING THANH VAN VO AS THE FRANCHISEE OF THE SUNOCO STATION LOCATED AT 2305 PENNSYLVANIA AVENUE, S.E. AND THAT THIS ORDER FURTHER REUIRED SUN TO CONTINUE SUPPLYING PETROLEUM PRODUCTS TO THE STATION. MR. ROSEMAN INQUIRED WHETHER SUN WOULD BE WILLING TO CONTINUE SUPPLYING PETROLEUM PRODUCTS TO THE STATION. MR. ROSEMAN INQUIRED WHETHER SUN WOULD BE WILLING TO CONSENT TO AN EXTENSION OF THAT PROVISION OF THE TEMPORARY RESTRAINING ORDER WHICH REQUIRED SUN TO CONTINUE TO SUPPLY PETROLEUM PRODUCTS UNTIL

FURTHER ORDER OF THE COURT IN LIEU OF PROCEEDING WITH A PRELIMINARY INJUNCTION HEARING.

4. I ADVISED MR. ROSEMAN THAT SUN COULD AGREE TO CONTINUE THAT PROVISION SO LONG AS WE WERE PAID FOR THE PRODUCTS DELIVERED AND SO LONG AS THE CONTINUATION WAS CONSISTENT WITH THE TERMS OF THE FRANCHISE AGREEMENT WHICH WAS THEN IN EFFECT.

5. MR. ROSEMAN TELECOPIED A DRAFT CONSENT ORDER FOR MY REVIEW WHICH CONTAINED A PROVISION FOR THE CONTINUATION OF SUPPLY OF PETROLEUM PRODUCTS TO THIS SUNOCO LOCATION. I DISCUSSED THE DRAFT ORDER WITH JOSEPH D. ZULLI, ESQ., MY SUPERIOR AT THAT TIME. I RECALL THAT WE MADE SOME CHANGES TO ENSURE THAT THE ORDER WAS CONSISTENT WITH THE FRANCHISE AGREEMENT AND THE PETROLEUM MARKETING PRACTICES ACT.

6. J. GORDON FORESTER, JR., OF THE FIRM OF POHORYLES & GREENSTEIN, P.C. HAD NOT BEEN RETAINED DURING THIS PERIOD OF NEGOTI-

ATIONS WITH MR. ROSEMAN AND CONSULTATION WITH MR. ZULLI. WHEN THESE NEGOTIATIONS WERE CONCLUDED, WE REALIZED THE NEED FOR LOCAL COUNSEL TO SIGN THE ORDER. I SUBSEQUENTLY CONTACTED MR. FORESTER AS HIS FIRM HAD PERFORMED SERVICES FOR SUN IN OTHER MATTERS, AND ADVISED HIM THAT WE HAD AGREED TO A CONSENT ORDER AND ASKED HIM TO SIGN THE ORDER AND ENTER HIS APPEARANCE ON BEHALF OF SUN. I SPECIFICALLY RECALL THAT I REQUESTED THAT HE REVIEW THIS CONSENT ORDER FOR FORM AND TO MAKE SURE THAT IT WAS CONSISTENT WITH LOCAL RULES. MR. FORESTER DID NOT PARTICIPATE IN ANY DISCUSSION REGARDING THE TERMS OF THE ORDER.

7. THE DECISION TO ENTER INTO THE CONSENT ORDER WAS SOLELY OURS AND THE TERMS WERE NEGOTIATED DIRECTLY WITH DAVID ROSEMAN. MR. FORESTER DID NOT COUNSEL SUN IN THIS DECISION NOR PARTICIPATE IN THE NEGOTIATIONS.

/S/: JEFFREY W. WAGNER

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
Civil Division

THANH VONG HOAI, et al., Plaintiffs	)
v.	) CA No. 89-2397
THANH VAN VO a/k/a Thoi Van Vo, et al., Defendants.	) (Oberdorfer, J.)

MOTION TO DISMISS
OF DEFENDANTS MILLARD F. OTTMAN, JR.
DAVID C. ROSEMAN,
AND JONES, DAY, REAVIS & POGUE

Defendants MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN AND JONES, DAY, REAVIS & POGUE herby move this Court, pursuant to Rules 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing the Complaint, as it pertains to them.

This motion is made upon the grounds that (a) plaintiffs have failed to effect proper service upon these moving defendants as required under Fed R. Civ. Pro. 4, and (2) the Complaint fails to state with respect to these defendants a

valid cause of action under 41 U.S.C. § 1983 or § 1985(3). This motion is based upon the Memorandum in support thereof, the affidavits of Millard F. Ottman, Jr., David C. Roseman, and Diane Ferguson, the Exhibits to the Roseman affidavit, and the pleadings already on file in this action.

Dated: November 29, 1989

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

BY:
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Millard F. Ottman, Jr.
David C. Roseman amd
Jones, Day, Reavis & Pogue

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of November, I caused to be served, by first-class mail, copies of the foregoing Motion to Dismiss of Defendants Millard F. Ottman, Jr., David C. Roseman and Jones,

Day, Reavis & Pogue; Memorandum of Defendants Millard F. Ottman, Jr., David C. Roseman and Jones, Day, Reavis & Pogue in Support of Motion to Dismiss; Proposed Order Granting Motion to Dismiss; Affidavit of Millard F. Ottman, Jr.; Affidavit of David C. Roseman; Affidavit of Diane Ferguson; and Exhibits to the Roseman Affidavit, upon the following:

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/s/ Brian P. Maschler

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THANH VONG HOAI, et al.) Plaintiffs	)	
v.	)	CA No. 89-2397
THANH VAN VO a/k/a Thoi Van Vo, et al.	)	(Oberforfer,J.)
Defendants.	)	

MEMORANDUM OF DEFENDANTS MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN, AND JONES, DAY, REAVIS & POGUE IN SUPPORT OF MOTION TO DISMISS

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MEMORANDUM OF DEFENDANTS MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN, AND JONES, DAY, REAVIS & POGUE IN SUPPORT OF MOTION TO DISMISS

Defendants Millard F. Ottman, Jr., ("Ottman"), David C. Roseman ("Roseman") and Jones, Day, Reavis & Pogue ("Jones, Day") submit this memorandum in support of their motion, pursuant to Fed. R. Civ.

Pro. 12(b)(5) and 12(b)(6), to dismis this action. Dismissal is mandated because (1) plaintiffs have failed to effect proper service on any of these defendants under Fed. R. Civ. Pro. 4, and (2) the Complaint fails to state a valid cause of action against these defendants under either 42 U.S.C. § 1983 or § 1985(3).

PRELIMINARY STATEMENT

This case represents an exceptionally reckless misuse of the Civil Rights Act, and an abuse of judicial process. The Complaint's ad hominem rhetoric and conclusory recitation of statutory language aside, it appears that the sole basis alleged for plaintiffs' 42 U.S.C. §§ 1983 and 1985(3) claims is the completely lawful attainment of a temporary restraining order relating to the possession of a service station. As to these moving parties, the attorneys and law firm which secured this interim relief on behalf of their

client, defendant Thanh Van Vo ("Vo"), this purported basis for plaintiffs' Civil Rights Act claims, as a matter of law, is no basis at all.

The subject temporary restraining order was issued by the Superior Court of the District of Columbia in favor of Vo, pursuant to notice and over plaintiffs' vigorous opposition, approximately three years ago. The order, as it pertained to plaintiffs, expired by its own terms ten days after its issuance. (Temporary Restraining Order entered August 29, 1986, Exhibit A to Affidavit of David C. Roseman ("Roseman Aff."). The order was extended with respect to another party, Sun Refining and Marketing Co. ("Sun Refining") shortly before the expiration of the 10-day period. (Consent Order for Extension of Temporary Restraining Order As To Defendant Sun Refining and Marketing Company, Exhibit B to Roseman Aff.) That

consent order, which explicitly excluded plaintiffs and thus imposed no additional restraint upon them beyond that already prescribed by law, expired over two and a half years ago.

Despite not being parties to the consent order, plaintiffs filed an interlocutory appeal of the order, raising many of the same challenges that they raise in the instant case. (See Notice of Interlocutory Appeal and Appellant's Opening Brief, Exhibit C. to Roseman Aff.) The Court of Appeals for the District of Columbia dismissed the appeals of plaintiffs John D. Hemenway and David Hemenway as "frivolous", and later dismissed the appeal of plaintiff Hoai as moot.

Having been rebuffed in their efforts to overturn an expired consent order which did not even apply to them, and rather than pursue this original action to its

conclusion[1], plaintiffs have resorted to a strategy of proliferation of new actions against the parties to the first Superior Court action, asserting many of the same grievances unsuccessfully raised in that original action and interlocutory appeal (See pp. 5-11, below). Thus, the present action, which was filed three years to the day after the hearing on the motion for a temporary restraining order[2], must be

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[1] That action, Vo v. Sun Refining and Marketing Company, Superior Court of the District of Columbia, Civil Division, Civ. Act. No. 7075-86, is still pending, but has been placed on the suspense calendar at the urging of the plaintiffs in the present case. There has been no final ruling on the merits of Vo's claims in that action, nor on the counterclaim of Hoai and the Hemenways.

[2] The applicable limitations period for §1983 and 1985(3) claims is three years. See Wilson v. Garcia, 471 U.S. 261, 275-76 (1985) (holding that the statute of limitations for § 1983 claims is the statute applicable to personal injury actions in the state in which the § 1983 claim is brought); Hobson v. Brennan, 625 F. Supp. 459, 466 (D.D.C. 1985) (J. Oberdorfer, presiding) (a three-year limitation period applies to § 1983 claims brought in the District of Columbia.

viewed as merely another in a long series of attempts to resurrect plaintiffs' collateral challenge to a dead interlocutory order which was issued in a case that is still pending. In the present case, plaintiffs have added to the roster of parties the private law firm and two of its attorneys who successfully obtained the temporary restraining order on behalf of their client. But as plaintiffs must concede, these defendants were not parties to the earlier action, had no personal stake in the outcome of the dispute, and functioned solely as advocates for the interests of their client.

As a matter of law, such advocacy does not provide a legitimate basis for a claim under 42 U.S.C. § 1983 or § 1985(3). We demonstrate below that plaintiffs have failed to meet their most basic pleading requirements applicable to claims under these sections. Their § 1983 claim must

fail because, among other deficiencies, plaintiffs do not and cannot state facts sufficient to sustain a valid claim that the defendant law firm and attorneys acted "under color of law" in representing the interests of Vo, and plaintiffs do not and cannot properly allege that they were deprived of any federal right as a result of defendants' actions. Their § 1985 claim must fail because the Complaint fails to allege any invidious, class-based discrimination, which allegation is a prerequisite to bringing such a claim.

This action also must be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(5), inasmuch as plaintiffs have failed to execute proper service upon these moving defendants.

FACTS[3]

A. Background

1. The D.C. Superior Court Action and The Temporary Restraining Order

On August 28, 1986 Vo, represented by Jones, Day, and in particular Ottman and Roseman, filed a civil action in the@ [sic] Superior Court of the District of Columbia against Thanh Vong Hai [sic] ("Hoai"), John D. Hemenway, David Hemenway, and Sun Refining. Vo alleged in that action, inter alia, that Hoai and the Hemenways had wrongfully and forceably evicted Vo from his Sunoco Service Station on August 25, 1986. (See Superior Court Complaint and Motion for Temporary Restraining Order, Exhibit D to Roseman

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[3] Jones, Day, Ottman and Roseman (collectively, "the Jones, Day defendants") respectfully request that, pursuant to Rule 201 of the Federal Rules of Evidence, the Court take judicial notice of earlier pleadings and court rulings concerning the subject matter of the instant dispute.

Aff.) Vo concurrently filed and served upon all defendants a motion for temporary restraining order. Id. On August 29, 1986, after a two-day evidentiary hearing before the Honorable Annice Wagner at which Vo, the Hemenways and several other witnesses testified, the Superior Court granted Vo's motion for a temporary restraining order. The order required, inter alia, that Hoai and the Hemenways return possession and occupancy of the station and all property thereon to Vo, and that Sun Oil continue to supply Vo with petroleum products and permit him to operate the service station under the terms of the existing franchise agreement between Vo and Sun Oil. (Exhibit B to Roseman Aff.)

No appeal from the TRO was taken by any defendant in that action. In light of his reinstatement to occupancy of the service station, Vo did not seek further in-

junctive relief against Hoai or the Hemenways, and the TRO expired with respect to them on September 8, 1986. In order to maintain the status quo with respect to the continued operation of the service station, Vo entered into a consent order with Sun Refining extending the temporary restraining order only as to Sun Refining. (Exhibit B to Roseman Aff.). The Consent Order was entered by the Superior Court on September 8, 1989. It expired, as did the temporary restraining order with respect to Sun Refining, on March 31, 1987.[4]

Hoai and the Hemenways, who were not parties to the consent order, nonetheless sought an interlocutory appeal of the order, challenging its validity. (Exhibit C to Roseman Aff.) The Court of Appeals for

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[4] The consent order was made expressly subject to the Superior Court's ultimate ruling on the merits of the dispute between Vo and Hoai. It was to expire on the earlier of the resolution of that dispute or March 31, 1987, the date the franchise agreement expired (Exhibit B).

the District of Columbia dimissed the appeal by Hoai and the Hemenways as frivolous (Exhibit E to Roseman Aff.)

In August, 1988, plaintiffs filed a third party complaint against the Jones, Day defendants among others, alleging, just as they do in the present action, that these defendants made misrepresentations to the Superior Court, and had extended the TRO without notice to Hoai. (See Answer, Counter-Claim and Third-Party Claims, at paras. 186-87, Exhibit G to Roseman Aff.) The third-party complaint further alleged that in committing these acts these defendants acted ultra vires the rules of the Superior Court. Id., para 188. Plaintiffs packaged these allegations as tortious interference with contract and business relationship, conspiracy, and violation of civil rights claims. Id., Counts 8-11, 13. This third party complaint was voluntarily dismissed

as to the Jones, Day defendants by plaintiffs after Superior Court Judge Weisburg informed them that under District of Columbia common law, in order to sue Jones, Day, plaintiffs would have to serve each individual partner of the firm.

As noted above, the Vo action is still pending.[5] It has been placed on the suspense calendar at the request of Hoai and the Hemenways while they pursue, in

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[5] Plaintiffs Hoai and the Hemenways moved to dismiss the Vo action, and for sanctions. The Superior Court denied those motions, noting as follows:

"In the court's view, if any party should be sanctioned under Rule 11, it is [Hoai and the Hemenways] have made a relatively simple case unnecessarily complicated, and by their filing of voluminous motions, many of which are particularly frivolous, and most of which are replete with inappropriate and irresponsible attacks against [Vo] and others, [Hoai and the Hemenways] have diverted this case off the Civil II calendar, where it belongs, requiring special assignment to a single judge for all purposes."

Order of July 26, 1985 [sic] at 5-6, attached as Exhibit H to Roseman Aff.

separate actions, parallel attacks on the same interlocutory ruling.

B. Other Actions

1. The RICO Action

On or about March 23, 1987 plaintiff Hoai filed a 133-page complaint against Vo and others in the United States District Court for the Eastern District of Virginia. That complaint alleged twenty-four counts, including, inter alia, ten counts brought under RICO, and one brought under 41 U.S.C. §§ 1983, 1985, 1986 and 1988. (RICO Complaint, attached as Exhibit I to Roseman Aff.) Most of the allegations of this complaint focused on the same ultimate issue -- concerning the right to the possession of the Sunoco service station -- that was at issue in the earlier Vo action that had been brought in the District of Columbia Superior Court. The Civil Rights Act claim set forth in Count XI of that complaint charged Vo and others

with "conspiring to file and filing false pleadings full of false allegations and by using fraud to deprive plaintiff of the assistance of his counsel." Id., para. 294. The complaint alleges that such conduct deprived Vo [sic] of the equal protection of the laws, in violation of 42 U.S.C. § 1985(3) -- just like the Complaint in the present action.

On July 2, 1987, the District Court for the Eastern District of Virginia entered an order dismissing the Complaint. (Order Dismissing RICO Complaint, Exhibit J to Roseman Aff.)

2. The Petroleum Marketing Practices Act ("PMPA") Action.

On or about September 5, 1987, Hoai filed in this Court an action under the PMPA against Sun Refining. (See Verified

Complaint, Exhibit K to Roseman Aff.)[6] This action also challenges the validity of the temporary restraining order entered in favor of Vo and the consent order. Id., at paras. 33-34. Defendant Sun Refining has filed a motion for summary judgment seeking a dismissal of all claims against it in this action, which motion is currently pending before the Court.

C. Plaintiffs' Allegations Against Jones, Day, Ottman and Roseman In the Present Action

The Complaint alleges that:

(a) the Jones, Day defendants "filed and obtained (sic) a motion for a TRO in the Superior Court of the District of Columbia" by use of affidavits "which they should have known were false" (Complaint,

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[6] Due to the pendency of this related action, whose relationship with the present case was noted to the Court by defendant Gordon S. Forester [sic] pursuant to Local Rule 405, the present case was reassigned to the Honorable Louis F. Oberdorfer.

para. 32), and by presenting at oral argument theories which were not included in any filing then before the Superior Court (Complaint, para. 33);

(b) Ottman obtained the TRO by "false statements to the Superior Court judge which statements were accepted as fact erroneously and incompetently by that judge" (Complaing, para 33);

(c) by "false charges," the Jones Day defendants deprived Hoai of "his right to a counsel of his choosing." (Complaint, para 34);

(d) by the use of false swearing and testimony, the Jones, Day defendants "deprived all of the plaintiffs of their freedom to travel in and in the vicinity of the gas station franchise in question and to operate the same," (Complaint, para 35);

(e) the Jones, Day defendants made false representations to SUNOCO in connection

with entering into the agreement which formed the basis for the consent order, (Complaint, para. 38);

(f) "defendants" (it is not clear whether these include the Jones, Day defendants) held out to the managers of the service station "that the Superior Court had required this result depriving Hoai of his station and franchise," (Complaint, para. 39); and

(g) the Jones, Day defendants "held out falsely" (as to whom the Complaint does not specify) that a TRO could be extended without notifying the major party in interest and without his consent," and "used the device of getting an unwitting judge to sign and ratify" the "voluntary agreement" between VO and Sun Refining. (Complaint, para, 43).

D. The Faulty Attempt At Service Upon Jones, Day, Ottman and Roseman

Plaintiffs' feeble attempt at service upon the Jones, Day defendants consisted solely of a process server's leaving copies of the Complaint and Summons at a reception desk of Jones, Day on November 9, 1989. See Returns of Service, attached as Exhibit L to Roseman Aff. As Ms. Diane Ferguson, the receptionist present at the desk on November 9, 1989, states in her affidavit, she was not authorized to accept service on behalf of any of these three defendants, and she expressly informed the process server of that fact. Affidavit of Diane L. Ferguson ("Ferguson Aff."), paras. 3,7. Ms. Ferguson further instructed the process server that, in any case, all deliveries to the firm had to be made to the firm's mailroom, located on another floor of the office. Id., para. 3. The process server simply ignored Ms. Ferguson's statements, left the documents on the desk, and departed. Id., para. 6.

On or about November 13, 1989, John Hemenway filed a document styled "Praecipe" with the Court in which he represented that service had been completed upon all defendants. This is patently false. No copies of these pleadings have ever been served directly upon Roseman or Ottman or anyone authorized to accept service for them, nor have any such documents reached their residences. Affidavit of Millard Ottman, para 1; Foseman Aff., para. 1. As to Jones, Day, these pleadings have not been served upon anyone authorized to accept them in the firm's behalf. Thus, not only was the service that <u>was</u> attempted on November 9, 1988 woefully defective as to the Jones, Day defendants, but Mr. Hemenway, an attorney, has completely fabricated a story regarding service, which appears in a signed pleading filed with this Court.

<u>ARGUMENT</u>

I. DISMISSAL OF THE COMPLAINT AS AGAINST THE ATTORNEY DEFENDANTS IS COMPELLED DUE TO INSUFFICIENT SERVICE OF PROCESS

Plaintiffs did not make valid service of process upon defendants as required under Rule 4 of the Federal Rules of Civil Procedure. Rule 4(d)(1) provides that service may be made upon an individual by delivering a copy of the summons and complaint "to the individual personally" or "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." (emphasis added). Rule 4(d)(3) provides that service may be made upon a partnership or other unincorporated association "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment

or by law to receive service of process ..."

It is plain that the attempted service upon the Jones, Day defendants by plaintiffs' messenger was not sufficient to effectuate service under Rule 4(d)(1). Service on a person or entity other than the defendant is effective under Rule 4(d)(1) only where that person or entity is specifically authorized to accept service on defendant's behalf. See Schwarz v. Thomas, 222 F.2d 305, 308 (D.C. Cir. 1955); 4A Wright and Miller, Federal Practice and Procedure, §§ 1097, 1098; 1 Moore's Federal Practice, para. 4.12. This authorization must come from the person upon whom service is to be made. Hardy v. O'Daniel, 16 F.R.D., 355, 356 (D.D.C. 1954); Bennett v. Circus U.S.A., 108 F.R.D. 142, 147 (N.D. Ind. 1985) ("there must be evidence of an actual appointment.").

Ms. Ferguson's affidavit recites that she had never been appointed or even asked to receive service of process on behalf of Jones, Day, Roseman or Ottman. Ferguson Aff., para. 7. Moreover, Ms. Ferguson's position as a receptionist at defendants' place of business did not automatically render her an agent for this purpose. In Larry M. Rosen & Associates, Inc. v. Hurwitz, 465 A. 2d 1114 (D.C. App. 1983), for example, the court held that service upon a receptionist in defendants' office, who was not authorized by defendants to accept service of process on their behalf, did not satisfy the requirements of Rule 4(d)(1), even though she was authorized to sign for and open all defendants' mail. Similarly, the courts have repeatedly held that service on secretaries or co-workers is not sufficient for purposes of Rule 4(d)(1), absent formal appointment or designation by law. Lensel Lopez v. Cor-

dero, 659 F. Supp. 889 (D. Puerto Rico 1987) (service upon official's secretary invalid where secretary was not an agent authorized by appointment to receive service of process); Betlyon v. Shy, 573 F. Supp. 1402, 1406 (D. Del. 1983) (same); Lamont v. Haig, 539 F. Supp. 552-57 (W.D.S.D. 1982) (same); Lavender-Cabellero v. Dep't of Consumer Affairs of the City of New York; 458 F. Supp. 213, 216 (S.D.N.Y. 1978) (merely dropping off a summons with a fellow employee is insufficient service of process absent evidence of authorization of fellow employee to accept service or representation by fellow employee that summons would be

delivered).[7]

Moreover, even if plaintiffs' messenger had delivered copies of the Summons and Complaint to Jones, Day's mailroom, see Ferguson Aff., para 3, this would still not have been proper service as to Ottman and Roseman. Delivery to a defendant's place of business does not fall within any of the categories under Rule 4(d)(1). See Leichtman v. Koons, 527 A.2d 745, 747 (D.C. App. 1987); Betlyon v. Shy, 573 F. Supp. at 1405. Thus, service of process on Jones Day would not have satisfied the requirements of Rule 4(d)(1) unless Ottman and Roseman had specifically designated Jones, Day as an agent to

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[7] That Ottman and Roseman eventually obtained a copy of the Summons and Complaint does not cure plaintiffs' defective service. Richards v. New York State Dep't of Corr. Services, 572 F. Supp. 1168, 1173 (personal service of summons upon a party through a co-employee does not constitute sufficient service unless the co-employee is an agent of the party to be served, even if summons shortly thereafter came into possession of party to be served).

receive service of process, which they did not. It follows, therefore, that the Complaint must be dismissed as to defendants Roseman and Ottman.

With respect to Jones, Day, leaving the Complaint and Summons with an unauthorized receptionist clearly did not effectuate service on the firm under Rule 4(d)(3). For the reasons already noted above, Ms. Ferguson was not "an officer, a managing or general agent" or other "agent authorized by appointment or by law to receive of process" on behalf on [sic] Jones Day. All counts against Jones Day should therefore be dismissed pursuant to Rule 12(b)(5).

II. THE COMPLAINT MUST BE DISMISSED AS AGAINST THE JONES, DAY DEFENDANTS BE CAUSE IT DOES NOT STATE A VALID CAUSE OF ACTION AGAINST THEM

Jones, Day, Ottman and Roseman have been sued in this case for successfully

representing the interests of their client, a private litigant, in a preliminary phase of a civil action. Plaintiffs - this time around - have framed their claims as Civil Rights Act violations. Even assuming the truth of all of plaintiffs' scurrilous charges against these moving parties, it is crystal clear that the allegations of the Complaint do not provide, as a matter of law, any valid basis for a claim under either § 1983 or u 1985(3).

We note at the outset that this Circuit has "articulated a heightened pleading standard demanding especial particularly [sic] in civil rights complaints." Thomas v. News World Communications, 681 F. Supp. 55, 67 (D.D.C. 1988) (J. Oberdorfer, presiding), citing Hobson v. Wilson, 737 F.2d 1 (D.D.C. Cir. 1984), cert denied, 470 U.S. 1084 (1985); see also Martin v. Malhoyt, 830 F.2d 237, 258 (D.C.

Cir.) reh'g denied, 833 F.2d 1049 (1987)[8] Accordingly, "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed . . . Diffuse and expansive allegations are insufficient . . . " Hobson v. Wilson, 737 F.2d at 30, quoting Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (emphasis added). In the instant case, the complaint is a classic example of a "vague," "conclusory," "diffuse" and "general" pleading. Repetitive incantations of statutory language fill the document, but these are not supported by reference to material facts. Hobson v. Wilson, 737

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[8]8 This strict pleading standard, which applies to claims brought under both § 1983 and 1985(3), Thomas v. News World Communications, 681 F.Supp. at 67, n.3, has been adopted by "every other circuit." Hobson v. wilson, 737 F.2d at 30 and n.87. See also, Robinson v. McCorkle, 462 F.2d 111, 114 (3d Cir. 1972), cert. denied, 409 U.S. 1042 (1972); Del Signore v. City of McKeesport, 680 F.Supp 200, 203 (W.D. Pa. 1988), aff'd, 877 F.2d 54 (3d Cir. 1989).

F.2d at 30. Plaintiffs' failure to meet this pleading standard is itself fatal to their claims. The deficiencies of the pleading are all the more glaring in view of plaintiffs' failure to satisfy the substantive pleading requirements which govern the assertion of claims under §§ 1983 and 1985(3). These requirements are discussed below.

A. Count I Does Not State A Valid Claim Under 42 U.S.C. § 1983

There are two fundamental and uncompromising requirements that a plaintiff must meet in order successfully to invoke § 1983.[9] First, a plaintiff must plead

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[9] 42 U.S.C. § 1983 provides:

Every person who, under color or any statute, ordinance, regulation, custom or usae, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities ecured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for releases.

and prove that the defendant has deprived him of a right that is secured by the Constitution and laws of the United States. Hagans v. Lavine, 415 U.S. 528, 536 (1974); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Second, he must plead and prove that the defendant deprived him of such a right while acting "under color of state ... law." Gomez v. Toledo, 446 U.S. 635, 640 (1980); Adickes v. S.H. Kress & Co., 398 U.S. at 150, citing Monroe v. Pape, 365 U.S. 167, 184 (1961). Plaintiffs have not met either of these requirements, and therefore have failed to state a cognizable claim under § 1983. We turn first to the "under color of law" requirement.

1. The Complaint Does Not Plead Facts Sufficient To Support Plaintiffs' Conclusory Claim That Defendants Acted "Under Color Of State Law".

Generally, a person acts "under color of state law" only when his conduct allegedly causing the deprivation of a federal right is "fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1981); see also United States v. Classic, 313 U.S. 299, 326 (1941). The United States Supreme Court has recognized a two-part approach to the question of "fair attribution." "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by rule of conduct imposed by the State or by persons for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may be fairly said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. at 937. "Without a limit such as this," noted the Court, "private parties could face constitutional litigation whenever they seek to rely on some state rule

governing their interaction with the community surrounding them." Id., see also Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966) (the "color of law" test is difficult to satisfy in cases where the defendant is not a governmental official).

While the Complaint is liberally peppered with the phrase "under color and authority of the laws of the District of Columbia," plaintiffs have not alleged any legitimate grounds for attributing to the state the conduct of the defendant private attorneys and law firm. Reading between the lines of the Complaint, it appears that plaintiffs contend, in the alternative, that the Jones, Day defendants acted "under color of law" (1) merely by using the processes of the District of Columbia judicial system; or (2) by conspiring in some unspecified way with state judicial officials. Both of these hypothetical bases require a strained reading of the

complaint; neither is availing for the purposes of satisfying the "under color of law" requirement.

If plaintiffs' contention is that one becomes cloaked with the authority of the State when he uses the state judicial system, plaintiffs are mistaken. See Dahl v. Alvin, 630 F.2d 277, 280-81 (5th Cir. 1980), cert. denied, 451 U.S. 908 (1981) (a private party's use of a state's judicial system is not state action even though the judicial process itself is a state action). To begin with, attorneys are not officials of government solely by virtue of being attorneys. In re Griffiths, 413 U.S. 717, 729 (1973). Nor are they imbued with the authority of the State by virtue of being officers of the Court. Drum v. Nasuti, 648 F. Supp. 888, 896 (E.D. Pa. 1986) aff'd, 831 F.2d 286 (3rd Cir. 1987). "An attorney does not become a state actor merely by virtue of

instigating state court litigation," Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983), citing Lugar v. Edmondson Oil Co., 457 U.S. at 939.

Moreover, private attorneys "cannot be held liable under section 1983 for unilateral actions which they took on behalf of their clients." Drum v. Nasuti, 648 F. Supp. at 897. Id. Attorneys who participate in the trial of private state court litigation are not state functionaries acting under color of state law. Skolnick v. Martin, 317 F.2d 855, 857 (7th Cir. 1963). See also Barnard v. Young, 720 F.2d at 1189 (an attorney does not act under color of state law merely by using the device of a subpoena duces tecum). And, attorneys who represent private clients in civil actions where the state has no interest and where no state statute authorizes the attorney's conduct which is later complained of, do not act

under color of state law. Kovacs v. Goodman, 383 F.Supp. 507, 509 (E.D.Pa. 1974), aff'd, 515 F.2d 507 (3rd Cir. 1975).

These general principles were adopted and applied by the United States Supreme Court in Polk County v. Dodson, 454 U.S. 312 (1981). In that case, the Court held that even a public defender, who is paid by the State, does not act under color of state law when he exercises independent judgment in a criminal proceeding and performs a lawyer's traditional functions as counsel for defendants. Id. at 323. The Court noted:

> (I)t is often said that lawyers are 'officers of the court.' But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983.

454 U.S. 318. Important to the Court's ruling was the fact that a public defender is "held to the same standards of com-

petence and integrity as a private lawyer," and that "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." Id. at 321. Such independence from the influence of the State is even clearer in the present case, where the attorneys' representation of their client in no way involved either the participation, the financing, or the approval of the State. Indeed, the Complaint alleges that judicial officials became involved in the acts complained of only after the attorney defendants had already completed their functions as advocates -- i.e., after the motion for a temporary order had been argued, and after the consent order had been agreed upon by Vo and Sun Refining.

In sum, the allegations of the Complaint, fairly read, merely describe the actions of attorneys qua attorneys. Under

the authority cited above, such allegations are insufficient to meet the "under color of law" requirement of § 1983.

It is also important to note that plaintiffs allege that the attorney defendants' attainment of a temporary restraining order without notice to Hoai was in violation of the "law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia." Complaint para. 43. In Lugar v. Edmondson, the Court ruled that an allegation that the defendant acted contrary to state law precludes a claim that the defendant acted "under color of state law":

> Count two alleged that the deprivation of property resulted from respondents' 'malicious, wanton, willful, opressive [sic] unlawful acts.' By 'unlawful' petitioner apparently meant 'unlawful under state law.' To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did

> they have the authority of state officials to put the weight of the state behind their private decision, i.e., this case does not fall within the abuse of authority doctrine recognized in Monroe v. Pape, 365 U.S. 167 (1961) . . . Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

457 U.S. at 940. In the present case, plaintiffs' allegation that defendants acted contrary to law (Complaint para. 43) is far more explicit than the one which proved dispositive in Lugar. Under the rule articulated in Lugar, Count I of the Complaint in this case "challenges only private action" and therefore must be dismissed.

Insofar as plaintiffs' "under color of law" recitations are grounded in some kind of conspiracy claim, such a claim must also fail. Private parties may be held liable under § 1983 if they conspire with state or local government officials to deprive others of their constitutional rights. See Adickes v. S.H. Kress & Co.,

398 U.S. at 152; Thomas v. News World Communications, 681 F. Supp. at 67. However, when a plaintiff alleges that a private person willfully participated in a joint action with a state official, he must plead and demonstrate that there existed between the private defendant and the state official an understanding, agreement, or conspiracy to deprive the plaintiff of a federal right. Drum v. Esute, 648 F. Supp. at 897. Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. Dennis v. Sparks, 449 U.S. 24, 28 (1980).

The "heightened pleading standard" articulated by this Circuit in Hobson v. Wilson applies with particular force where private parties are sued under § 1983 based upon an alleged conspiracy. 737 F.2d at 30. In the present case, the Com-

plaint does not contain any express allegations of judicial conspiracy. Paragraph 44 of the Complaint states only that "the defendants, and all of them, schemed and planned to evade this requirement and to instead use the very color of law and apparent authority of the Superior Court to deprive the plaintiff Hoai of those important rights . . . and of his property, the gas station." No particular facts of this alleged scheme appear anywhere in the Complaint. Such a vague and conclusory allegation runs squarely aginst the pleading standard set forth in Hobson, and thus cannot suffice as a basis for plaintiffs' "under color of law" averment.

In sum, plaintiffs have failed to state with the requisite particularity any cognizable basis for their conclusory contention that the attorney defendants, in representing the private interests of Vo, acted under color of state law. Moreover,

certain allegations of the Complaint completely foreclose such a contention.

2. The Complaint Does Not Properly Allege The Deprivation Of A Federal Right

Plaintiffs have failed to meet the second prong of the threshold pleading requirements applicable to § 1983 claims -- namely, alleging the deprivation of a federal right. See Samuels v. district of Columbia, 770 F.2d 184, 199 (D.C. Cir. 1985). Section 1983 does ot reach conduct that violates only state law. Baker v. McCollan, 443 U.S. 137, 142 (1979).

The deprivations that plaintiffs do allege are the following: (1) Hoai's right to occupy the service station; (2) John Hemingway's [sic] right to represent Hoai; (3) David Hemingway's [sic] right to work at the service station; (4) Hoai's right to counsel of his choosing; (5) plaintiffs' right to travel in the vicini-

ty of the service station; and (6) plaintiffs' due process right to notice of the consent order between Hoai [sic] and Sun Refining. These so-called "rights" either do not arise under federal law or the Constitution, or are so generally and conclusorily plead as to render them patently insufficient to support plaintiffs' § 1983 claim.

There is no federally-sanctioned "right" to operate a service station, to represent another in a judicial proceeding, to work at a service station, or to retain a particular attorney in a civil matter. See Thomas v. News World Communications, 681 F. Supp. at 66 (no action under § 1983 will lie for assault, defamation or libel because neither the Constitution nor other federal law establishes a right or privilege to be free from assault, defamation or libel). Plaintiffs' claim to a right of freedom to

travel within the vicinity of the service station likewise has no basis in federal law. The only federally recognized "right to travel" is that provided in Clause 1 of Section 2 of Article 4 of the Constitution. That section has been construed to provide that a Untied States citizen has the right to travel from one state and to take up residence in a state of his choice. E.g., Jones v. Helms, 452 U.S. 412, 418 (1981). Plaintiffs' claimed right to "travel within the vicinity of the service station" certainly does not come within this protection.

Due process is unquestionably a constitutional right, but plaintiffs have failed to plead facts sufficient to demonstrate that any conduct of the attorney defendants deprived plaintiffs of that right. Plaintiffs apparently allege that the agreement between Vo and Sun Refining gave rise to the consent order

and the court's signing of that order without notice to plaintiffs resulted in a deprivation of due process. Complaint, paras. 43-45. Such a contention is unavailing as a matter of law. As admitted in the Complaint, none of the plaintiffs was a party to this consent order; indeed, it explicitly excluded plaintiffs from its reach. Accordingly, the pendency of the consent order impaired no legal right of plaintiffs whatsoever. It did not, and does not, hinder plaintiffs from exercising any right they may have to pursue their claims and defenses in the Superior Court action, or for that matter, any other right they may have. Defendants did not, and could not, prevent plaintiffs from exercising their "right, if any there were, to challenge this third-party order. Plaintiffs appealed the consent order and

lost[10]. Similarly, defendants were not in a position to prevent plaintiffs from seeking to enjoin the operation of the consent order, a remedy available to them under Rule 65 of the Superior Court Rules, which is identical to the same federal rule. Plaintiffs failed to seek such a hearing.

Due process rights are not implicated where two private parties enter into a private agreement without providing notice to, or obtaining the consent of a non-party. The fact that the Superior Court approved the consent order did not alter its basic character. In short, the facts surrounding the consent order do not support plaintiffs' claimed deprivation of due process.

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10 Notably, the Complaint does not allege that the Court of Appeals for the District of Columbia acted in concert with defendants in denying plaintiffs' interlocutory appeal.

To the extent that plaintiffs' claims of deprivation of due process are based upon the attorney defendants' allegedly false statements to the District of Columbia Superior Court, (which is by no means clear from the Complaint), such claims are barred, as a matter of law, by the doctrine of absolute privilege. Communications made by an attorney during the course of and as part of a judicial proceeding are absolutely privileged, provided that the statements bear some relation to the proceeding. See Arneja v. Gildar, 541 A.2d 621, 623 (D.C. 1988); Mohler v. Houston, 356 A.2d 646, 647 (D.C. 1976) (attorneys protected from defamation actions by absolute privilege for statements made in the course of judicial proceedings). The absolute privilege from suit has been extended to actions filed under § 1983. E.g., Holt v. Casteneda, 832 F.2d 123, 125-26 (9th Cir. 1987),

cert. denied, 108 S.Ct. 1275 (1988); Katz v. Morgenthau, 709 F. Supp. 1219, 1232 (S.D.N.Y. 1989) (witnesses in adversarial hearing held to be absolutely immune from § 1983 actions).

The absolute privilege reflects the importance and necessity of the free flow of information during judicial proceedings. Creamer v. Danks, 700 F. Supp. 1169, 1171 (D. Me. 1988), aff'd, 863 F.2d 1037 (1st Cir. 1988). An attorney must be free to assert all relevant statements necessary to fully and strenuously to represent the interests of his client. Id.

In the present action, plaintiffs state that the allegedly false statements of the attorney defendants were made during the course of judicial proceedings and were directly related to that action. In light of the absolute privilege attaching to statements of counsel and the underly-

ing public policy against imposing barriers to zealous advocacy, the statements made by the attorney defendants in court cannot provide a valid basis for plaintiffs' § 1983 claim.

Finally, to the exten that the Hemenways' § 1983 claims are based upon the entry of the consent order, such claims are barred under the doctrine of collateral estoppel. Under this doctrine, "issues fully litigated between the parties in one action are conclusively determined therein and may not be relitigated in any subsequent action between the same parties or their privies." Hagans Management Co., Inc. v. Nichols, 409 A.2d 179, 181 (D.C. App. 1979); U.S. v. Lima, 424 A.2d 113, 116 (D.C. App.

1980).[11] This rule applies even though the cause of action for the relief sought in the subsequent action differs from that in the original suit. Goldkind v. Snider Bros., Inc., 467 A.2d 468, 473-74 (D.C. App. 1983); Adams v. Jonathan Woodner Co., 475 A.2d 393 (D.C. App. 1984). Furthermore, it is "beyond doubt that the defense of res judicata is available in a subsequent § 1983 action." Hernandez v. City of Lafayette, 699 F.2d at 736, citing Allen v. McCrory, 449 U.S. 90, 101 (1980).

As noted above, plaintiffs have already challenged the procedural validity of the consent order, in an interlocutory appeal to the District of Columbia Court of Appeals. (Exhibit C to Roseman Aff.) That court dismissed the appeal as frivo-

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[11] A Federal court asked to give res judicata effect to a state court judgment must apply the res judicata principles of the state whose decision is set up as a bar to further litigation. Hernandez v. City of Lafayette, 699 F.2d 734, 736 (5th Cir. 1983).

lous. (Exhibit E to Roseman Aff.) This dismissal pursuant to Rule 14 of the Rules of the District of Columbia Court of Appeals constitutes a conclusive ruling on the Hemenways' claims, which may later bar the assertion of the same arguments in a subsequent action. See Fletcher v. Vakas, 144 A.2d 105-106 (D.C. 1958) (dismissal of complaint for failure to state a cause of action constitutes an adjudication on the merits, barring litigation of the dismissed claims in a subsequent action).

Thus, since the Hemenways raised the issue of the validity of the consent order in their interlocutory appeal, and the District of Columbia Court of Appeals has already ruled that their challenge to the order was frivolous, the Hemenways are barred from re-raising this challenge in the present action. Their challenge to the consent order is no less frivolous now that it has been raised in another court,

under a different guise. Changing the label of these already-litigated claims does not entitle the Hemenways to relitigate the issue of the validity of the consent order.[12]

The foregoing reasons, plaintiffs may not sustain a valid claim under 42 U.S.C. § 1983. Accordingly, Count I of the Complaint must be dismissed, with prejudice.

B. Count II Fails to State A Valid Claim Under 42 U.S.C. § 1985(3)

Plaintiffs allege in Count Two of the Complaint that defendants conspired to deprive Mr. Hoai of his property rights "by the use of the consent order and al-

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12 As noted above, Hoai's claim that Vo's alleged false statements to the Superior Court deprived Hoai of the equal protection of the laws in violation of 42 U.S.C. § 1985(3) was previously raised in the RICO action, but conclusively rejected by the district court in dismissing that action. (Exhibit J to Roseman Aff.) Thus, Hoai, and arguably the Hemenways, are collaterally estopped from pursuing such a claim in the present action. (See discussion of Count II, below.)

legedly false testimony" in violation of 42 U.S.C. § 1985(3). (Complaint, para. 48). Once again, plaintiffs have failed to plead sufficient facts to support their claim. Section 1985(3) does not apply to all conspiratorial interferences with the rights of others, but is very limited in scope. It provides, in pertinent part:

> If two or more persons in ant [sic] State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The Supreme Court has interpreted the statute's intent requirement to mean that "there must be some racial, or perhaps otherwise class-based, indiviously discriminatory animus behind the conspirator's action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Accordingly, this Circuit has held that to state

a valid claim under § 1985(3), a plaintiff must allege:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons for the equal protection of laws . . . and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States.

Martin v. Malhoyt, 830 F.2d 237, 258 (D.C. Cir. 1987), citing Hobson v. Wilson, 737 F.2d at 14.

In the present case the Complaint alleges that defendants' actions constituted an "invidious discrimination," at para. 48, but does not state that such actions were motivated by a racial or any other class-based animus. Under Griffin, and

Martin v. Malhoyt, this omission is fatal to Count II.[13] "Rightful franchise holders," Complaint, para. 48, do not constitute a "class" whose interests are protected under § 1985(3).

Finally, plaintiffs' failure to state the exact nature of the discrimination of which they complain runs afoul of the heightened specificity requiement governing the pleading of civil rights actions, Hobson v. Wilson, 737 F.2d 1, and thus also compels a dismissal of Count II. In Hobson, the court stated:

> In cases involving a claim that the defendant acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must be present in a complaint.

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[13] It appears, in contrast, that plaintiffs imply that the alleged discrimination was motivated by purely economic reasons. Yet the Supreme Court has expressly declined to interpret § 1985(3) to encompass conspiracies motivated by commercial or economic animus. United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 836-39 (1983).

Id., at 29. See also Martin v. Malnoyt, 830 F.2d at 258 ("unsupported factual allegations which fail to specify in detail the factual basis necessary to enable [defendants] to intelligently prepare their defense will not suffice to sustain a claim of governmental conspiracy."); Thomas v. News World Communications, 681 F. Supp. at 67.

Given the Complaint's failure to allege a class-based animus, or to allege facts with sufficient particularity to support a claim of conspiracy or of invidious discrimination, Count II must be dismissed, with prejudice.

CONCLUSION

For the foregoing reasons, defendants Jones Day, Ottman and Roseman respectfully request this Court to issue an order dismissing, with prejudice, the Complaint as it pertains to them.

Dated: November 29, 1989

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

BY: Francis X. Markey (No 387678)
Brian P. Maschler
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U.S.DISTRICT COURT
USDC DISTRICT OF COLUMBIA (WASHINGTON)
CIVIL DOCKET FOR CASE # 887-CV-2456

(JUNE 12, 1991 THRU OCTOBER 3,1991)

HOAI . SUN REFINING/MARKETING
ASSIGNED TO: JUDGE LOUIS F. OBERDORFER
REFERRED TO: MAGISTRATE PATRICK J. ATTRIDGE
DEMAND: $30,000 (SIC)
LEAD DOCKET: NONE
DKT# IN OTHER COURT: NONE
FILED: 9/8/87
JURY DEMAND: PLAINTIFF
NATURE OF SUIT: 890
JURISDICTION: FEDERAL QUESTION

THANH VONG HOAI PLAINTIFF	LAURENCE A. ELGIN [COR] 2762 WOODLEY PLACE WASHINGTON, DC 20008 (202) 628-1114 JOHN DAVID HEMENWAY [COR LD NTC] 4816 RODMAN STREET,NW WASHINGTON, D.C. 20016 (202) 244-4819 S. CHURCHILL ELMORE [COR NTC] 805 15TH STREET, NW SUITE 600 WASHINGTON, DC 20005 (202) 626-4082
V.	
SUN REFINING AND MARKETING CO.,INC.	JOHN GORDON FORESTER, JR. [COR LD NTC] GREENSTEIN, DELORME &

DEFENDANT LUCHS
1620 L STREET, NW
SUITE 900
WASHINGTON, D.C. 20036
(202) 452-1400

* * * *

DATE	DKT#	ACTION
6/12/91	---	PRE-TRIAL CONFERENCE BEFORE JUDGE LOUIS F. OBERDORFER FURTHER PRETRIAL CONFERENE SET FOR JUNE 14, 1991, 3:15PM; TRIAL TO COMMENCE ON JUNE 20, 1991 REPORTER T. DOURIAN (MON)
6/12/91	311	ORDER (COPY) FILED IN USCA 6/12/91 DENYING THE PETITION FOR A WRIT OF MANDAMUS
6/13/91	318	NOTICE OF FILING BY DEFENDANT'S SUN REFINING/ MARKETING STATEMENT OF

MATERIAL FACTS IN GENUINE ISSUE; EXHIBITS (3) (BLJ)

[ENTRY DATE 06/14/91]

6/14/91 317 ORDER BY JUDGE LOUIS F. OBERDORFER: PRETRIAL CONFERENCE SET FOR 2:45 6/24/91; TRIAL SET FOR JUNE 20, 1991 IS CONTINUED TO A DATE TO BE SCHEDULED. (N) (MON)

6/17/91 319 NOTICE OF FILING BY DEFENDANT SUN REFINING/MARKETING OF CORRECTED PRETRIAL STATEMENT WHICH CORRECTLY IDENTIFIES THE FILING PARTY AS DEFENDANT. ATTACHMENT (AJR) [ENTRY DATE 06/19/91]

6/19/91 320 RESPONSE BY DEFENDANT SUN

REFINING/MARKET IN OPPOSI- TION TO PLAINTIFF'S MOTIN TO STRIKE DEFENDANT'S EXPERT WITNESS [309-1] BY THANH VON HOAI; ATTACHMENTS (2) (BLJ) [ENTRY DATE 06/25 91]

6/19/91 321 PRETRIAL STATEMENTS (SUP- PLEMENTAL) BY DEFENDANT SUN REFINING/MARKET (BLJ) [ENTRY DATE 06/21/91]

6/21/91 322 NOTICE TO TAKE DEPOSITION BY PLAINTIFF THANH VONG HOAI; OF MR. DAVID ROSEMAN, AND MR. MILLARD OTTMAN (BLJ) [ENTRY DATE 06/26/91]

6/24/91 -- PRE-TRIAL CONFERENCE BEFORE JUDGE LOUIS F. OBERDORFER

REPORTER: TOM DOURIAN (MON)

6/24/91 325 MOTION BY THANH VONG HOAI FOR RECONSIDERATION AND CORRESPONDING TIME EXTENSION WITH REGARD TO DOCUMENTS AND INTERROGATORY ANSWERS FOR DEFENDANT (BM) [ENTRY DATE 07/02/91]

6/24/91 326 MOTION BY THANH VONG HOAI FOR RECONSIDERATION OF THE MAGISTRATE'S RULING WITH REGARD TO PLAINTIFF'S PROPOSED EXPERT WITNESSES; ATTACHMENT (BM) [ENTRY DATE 007/20/91]

6/24/91 327 MOTION BY THANH VONG HOAI FOR RECONSIDERATION OF THE MAGISTRATE'S RULING DENY-

ING PLAINTIFF'S MOTION TO
COMPEL COMPLETE AND TRUTHFUL
RESPONSES FROM
A WITNESS; ATTACHMENT (BM)
[ENTRY DATE 07/02/91]

6/24/91 328 MOTION BY THANH VON HOAI
FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING DENYING
PRODUCTION OF DOCUMENTS FROM
DEFENDANT; ATTACHMENT.
(BM) [ENTRY DATE 07/02/91]

6/24/91 329 MOTION BY THANH VONG HOAI
FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING WITH
REGARD TO PLAINTIFF'S
MOTION TO COMPEL ANSWERS
TO INTERROGATORIES; ATTACH-
MENT (BM) [ENTRY DATE 07/02/91]

6/27/91 330 RESPONSE BY DEFENDANT SUN REFINING/MARKET IN OPPOSI- TION TO MOTION FOR RECON- SIDERATION OF THE MAGIS- TRATE'S RULING WITH REGARD PLAINTIFF'S PROPOSED EXPERT WITNESSES [326-1] BY THANH VONG HOAI (AJR) [ENTRY DATE 07/08/91]

6/27/91 331 RESPONSE BY DEFENDANT SUN REFINING/MARKET IN OPPOSI- TION TO MOTION FOR RECON- SIDERATION AND CORRESPOND- ING TIME EXTENSION WITH RE- GARD TO DOCUMENTS AND INTERROGATORY ANSWERS FOR DEFENDANT [325-1] BY THANH VONG HOAI (AJR) [ENTRY DATE 07/08/91]

6/27/91 336 ORDER BY JUDGE LOUIS F. OBERDORFER: DENYING MOTION TO SHOW CAUSE FOR FAILURE TO COMPLY WITH COURT ORDER OF MARCH 18, 1991 [307-1] BY THANH VONG HOAI; DIRECTING THE JUDGMENT FOR THE DEFENDANTS AGAINST PLAINTIFF'S COUNSEL IN THE AMOUNT OF $50.00 (N) (KS) [ENTRY DATE 07/10/]

6/27/91 337 ORDER BY JUDGE LOUIS F. OBERDORFER; DENYING MOTION FOR RECONSIDERATION OF THE MEMORANDUM AND ORDER DENYING SUMMARY JUDGMENT ENTERED 6/3/91 ON AN EXPEDITED BASIS [310-1] BY

THANH VONG HOAI, DENYING MOTION IN LIMINE FOR RULINGS EXCLUDING EX POST

FACTS DOCUMENTS AND LINES OF TESTIMONY [276-1] BY THANH VONG HOAI (N) (KS) [ENTRY DATE 07/10/91]

6/28/91 324 ORDER BY JUDGE LOUIS F. OBERDORFER; DENYING MOTION TO STRIKE DEFENDANT'S EXPERT WITNESS [309-1] BY THANH VONG HOAI DISCOVERY DUE 7/23/91; PRETRIAL CONFERENCE SET FOR 1:45 9/16/91; TRIAL SET FOR 10:00 10/7/91; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DUE 8/1/91; PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT DUE 8/20/

91 SHOW CAUSE HEARING SET
FOR 7/8/91; (N) (MON)

6/28/91 332 RESPONSE (SUPPLEMENTAL) BY
PLAINTIFF THANH VONG HOAI
TO REQUEST FOR PRODUCTION
OF DOCUMENTS; ATTACHMENTS
(9) (CLV) [ENTRY DATE 07/
10/91]

6/28/91 333 MOTION BY PLAINTIFF THANH
VONG HOAI FOR PROTECTIVE
ORDER (CLV) [ENTRY DATE
07/10/91]

6/28/91 334 SUPPLEMENTAL MEMORANDUM TO
MOTION FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING
WITH REGARD TO PLAINTIFF'S
MOTION TO COMPEL ANSWERS TO
INTERROATORIES [329-1] BY

THANH VONG HOAI (CLV) [ENTRY DATE 07/10/91]

6/28/91 335 ANSWER (SUPPLEMENTAL) BY PLAINTIFF THANH VONG HOAI TO INTERROGATORIES (CLV)
[ENTRY DATE 07/10/91]

7/2/91 338 SUPPLEMENT TO RULE 26(B)(4) STATEMENT FILED BY DEFENDANT SUN REFINING/MARKET.
ATTAHMENT (AJR) [ENTRY DATE 07/10/91]

7/2/91 339 RESPONSE BY PLAINTIFF THANH VONG HOAI TO THE COURTS REQUEST TO SHOW CAUSE;
ATTACHMENT (KMK)[ENTRY DATE 07/11/91]

7/8/91 340 RESPONSE BY PLAINTIFF THANH

VONG HOAI TO ORDER DISCOVERY DUE 7/23/91;

PRETRIAL CONFERENCE SET FOR 1:45 9/16/91; TRIAL SET FOR 10:00 10/7/91; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DUE 8/20/91 SHOW CAUSE HEARING SET FOR 7/8/91;

[324-1] ORDER [324-2]. ATTACHMENT (AJR) [ENTRY DATE 07/11/91]

7/10/91 341 NOTICE TO TAKE DEPOSITION BY DEFENDANT SUN REFINING/ MARKET OF PLAINTIFF THANH VONG HOAI (AJR) [ENTRY DATE 07/12/91]

7/10/91 342 REQUEST BY DEFENDANT SUN REFINING/MARKET TO PLAINT- IFF THANH VONG HOAI FOR

PRODUCTION OF DOCUMENTS.
(AJR) [ENTRY DATE 07/12/91]

7/10/91 343 MOTION BY DEFENDANT SUN REFINING/MARAKET FOR SUMMARY JUDGMENT ON THE EXEMPLARY DAMAGES; EXHIBITS (6) (MF) [ENTRY DATE 007/12/92]

7/11/91 344 DEPOSITION OF RODNEY SISK TAKEN FOR DEFENDANT SUN REFIING/MNARKET ON 6/12/91 [ENTRY DATE 07/12/91]

7/12/91 345 SUPPLEMENTAL MEMORANDUM BY DEFENDANT IN OPPOSITION TO APPEAL OF THE MAGISTRATE'S RULING WITH REGARD TO DENIAL OF ADDITIONAL EXPERT WITNESSES [326-1] BY THANH VONG HOAI (CPJ) [ENTRY DATE

07/15/91]

7/12/91 346 MOTION BY DEFENDANT SUN REFINING/MARKET TO AMEND THE SUPPLEMENTAL PRETRIAL ORDER (JDA) [ENTRY DATE 007/16/91]

7/22/91 347 MOTION BY DEFENDANT SUN REFINING/MARKET TO ADMIT COMPUTERIZED MONTHLY TOTALS OF GASOLINE SOLD TO THE SUN STATION; ATTACHMENTS (CLV) [ENTRY DATE 07/21/91]

7/23/91 348 MOTION BY PLAINTIFF THANH VONG HOAI TO COMPEL DISCOV- ERY OF IN-FORMATIN ESSENTIAL FOR COMPLIANCE WITH COURT ORDER OF 6/28/91 (CJP) [ENTRY DATE 07/24/91]

7/25/91 349 MOTION BY DEFENDANT SUN
REFINING/MARKET FOR SUMMARY JUDGMENT ON
THE LIMITATION
OF DAMAGES FROM 9/8/86 TO
4/27/87; EXHIBITS (9) (CPJ)
[ENTRY DATE 07/30/91]

7/31/91 350 MEMORANDUM BY SUN REFINING/
MARKET IN OPPOSITION TO
MOTION TO COMPEL DISCOVERY OF INFORMA-
TION ESSENTIAL
FOR COMPLIANCE WITH COURT
ORDER OF 6/28/91 [348-1] BY
THANH VONG HOAI (BM) [ENTRY DATE
08/01/91]

8/1/91 351 ORDER BY MA/JUDGE PATRICK
J. ATTRIDGE: DIRECTING
DEFENDAT TO REQUEST FROM
ITS FORMER EMPLOYEE LINDA

FIDEL-GRAHAM TO VOLUNTARILY APPEAR NO LATER THAN 8/16/91 FOR A DEPOSITION BY COUNSEL FOR THE PLAINTIFF;

IF DATE IS NOT AGREEABLE TO THE WITNESS, THE DEFENDANT SHALL PROVIDE THE PLAINTIFF BY 8/10/91 WITH THE WITNESS' LAST KNOWN RESIDENCE AND BUSINESS ADDRESS; (N) (CLV) [ENTRY DATE 08/02/91]

8/5/91 352 MOTION BY PLAINTIFF THANH VONG HOAI TO EXTEND TIME TO 8/16/91 TO REPLY TO DEFENDANT'S MOTION TO ADMIT COMPUTERIZED MONTHLY TOTALS OF GASOLINE SOLD TO THE SUN STATION (CPJ) [ENTRY DATE 08/07/91]

8/5/91 353 RESPONSE BY PLAINTIFF THANH VONG HOAI IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON THE EXEMPLARY DAMAGES [343-1] BY SUN REFINING/ MARKET, AFFIDAVITS (3), ATTACHMENTS (CJP) ENTRY DATE 08/07/91]

8/5/91 354 MOTION BY PLAINTIFF THANH VONG HOAI FOR LEAVE TO FILE TO RESPOND OUT OF TIME TO MOTION OF DEFENDANT TO AMEND THE SUPPLEMENTAL PRE- TRIAL ORDER (CJP) [ENTRY DATE 08/13/91]

8/12/91 355 NOTICE OF FILING BY PLAINTIFF THANH VONG HOAI OF COMPLIANCE WITH

MAGISTRATE'S ORDER OF
8/1/91 (CJP) [ENTRY DATE
08/13/91]

8/12/91 356 RESPONSE BY PLAINTIFF THANH VONG HOAI TO DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS (AJR) [ENTRY DATE 08/13/91]

8/12/91 357 NOTICE OF FILING BY PLAINTIFF THANH VONG HOAI OF COPIES OF DOCUMENTS NECESSARY FOR A COMPREHENSIVE EVALUATION OF PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT ON EXEMPLARY DAMAGES. ATTACHMENT (AJR) [ENTRY DATE 08/13/91]

8/15/91 358 MOTION BY PLAINTIFF THANH VONG HOAI FOR A JUDICIAL ESTOPPEL AGAINST DEFEND- ANT'S CHANGE OF POSITION ON THE QUESTION OF VO'S PRESENCE IN THE STATION, AND, UNDER FRCIVP 56(F) FOR FURTHER DOCUMENT DIS- COVERY INTERROGATORIES AND TESTIMONY BY SUN PERSONNEL EXHIBITS (5) (AJR) [ENTRY DATE 08/16/ 91]

8/16/91 359 RESPONSE BY DEFENDANT SUN REFINING/MARKET IN OPPO- SITION TO MOTION TO ADMIT COMUTERIZED MONTHLY TOTALS OF GASOLINE SOLE TO THE SUN STATION [347-1] BY SUN RE- FINING/MARKET (CPJ) [ENTRY DATE 08/20/91]

8/20/91 360 RESPONSE BY DEFENDANT SUN
REFINING/MARKET IN OPPO-
SITION TO MOTION FOR A JUDICIAL
ESTOPPEL AGAINST
DEFENDANT'S CHANGE OF POSI-
TION ON THE QUESTION OF
VO'S PRESENCE IN THE STA- TION, AND,
UNDER FRCIVP 56(F) FOR FURTHER DOCU-
MENT
DISCOVERY, INTERROGATORIES
AND TESTIMONY BY SUN PER-
SONNEL [358-1] BY THANH VONG HOAI
(CJP) [ENTRY
DATE 008/21/91]

8/20/91 361 RESPONSE BY PLAINTIFF THANH
VONG HOAI IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

ON THE LIMITATION OF DAMAGES FROM 9/8/86 TO 4/17/91 P349-1] BY SUN
REFINING/MARKET; ATTAHMENT
(CJP) [ENTRY DATE 08/21/91]

8/22/91 362 MOTION BY DEFENDANT SUN
REFINING/MARKET TO COMPEL
DISCOVERY-PRODUCTION OF
DOCUMENTS; ATTACHMENT (DOT)
[ENTRY DATE 08/23/91]

8/27/91 363 NOTICE OF FILING BY PLAINT-IFF THANH VONG HOAI OF
STATEMENT OF GENUINE ISSUES
II FOR CONSIDERATION WITH
HIS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY
DEFENDANT FOR A LIMIT ON
COMPENSATORY DAMAGES (AJR)
[ENTRY DATE 09/03/91]

8/27/91 364 REPLY BY DEFENDANT SUN
REFINING/MARKET TO RESPONSE
TO MOTION FOR SUMMARY JUDG-
MENT ON THE LIMITATION OF
DAMAGES FROM 9/8/86 TO
4/27/87 [349-1] BY SUN
REFINING/MARKET (AJR) [ENTRY DATE
09/03/91]

8/30/91 369 RESPONSE BY PLAINTIFF THANH
VONG HOAI IN OPPOSITION TO
MOTION TO AMEND THE SUPPLE-
MENTAL PRETRIAL ORDER [346- 1] BY SUN
REFINING/MARKET
(AJR) [ENTRY DATE 09/03/91]

9/3/91 365 ORDER BY JUDGE LOUIS F.
OBERDORFER: DENYING MOTION
FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING WITH

REGARD TO PLAINTIFF'S PROPOSED EXPERT WITNESSES

[326-1] BY THANH VONG HOAI (N) (MON)

9/3/91 366 ORDER BY JUDGE LOUIS F. OBERDORFER: DENING MOTIN FOR RECONSIDERATION OF THE MAGISTRATE'S RULING WITH REGARD TO PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES [329-1] BY THANH VONG HOAI (N)(MON)

9/3/91 367 ORDER BY JUDG LOUIS F. OBERDORFER: DENYING MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S RULING DENYING PRODUCTION OF DOCUMENTS FROM DEFENDANT [328-1] BY THANH VONG HOAI (N) (MON)

9/3/91 368 ORDER BY JUDGE LOUIS F. OBERDORFER: DIRECTING PARTIES TO FILE NO FURTHER MOTIONS PRIOR TO TRIAL WITHOUT LEAVE OF THE COURT (N)(MON)

9/5/91 370 RESPONSE BY PLAINTIFF THANH VONG HOAI MOTION TO COMPEL DISCOVERY-PRODUCTION OF DOCUMENTS [362-1] BY SUN REFINING/MARKET; ATTACH- MENTS (5) (CLV)[ENTRY DATE 09/06/91]

9/9/91 371 REQUEST BY PLAINTIFF THANH VONG HOAI FOR AMENDMENTS AND ALTERATIONS TO THE PRE-TRIAL ORDER; (5 REQUESTS) (CLV) [ENTRY DATE 09/10/91]

9/10/91 372 ORDER BY JUDGE LOUIS F. OBERDORFER: SUMMARY JUDGMENT HEARING SET FOR 1:45 9/16/91; (N)(MON)

9/10/91 373 TRANSCRIPT OF PROCEEDINGS FILED FOR DATE OF 6/12/91 REPOTER: T. DOURIAN (CLV) [ENTRY DATE 09/11/91]

9/10/91 374 TRANSCRIPT OF PROCEEDINGS FILED FOR DATE OF 6/24/91 REPORTER: T. DOURIAN (CLV) [ENTRY DATE 09/11/91]

9/13/91 375 MOTION BY PLAINTIFF THANH VONG HOAI FOR LEAVE TO FILE MOTION FOR THE ADDITION OF A WITNESS EXHIBIT (MOTION) (SJP)(ENTRY DATE 09/18/91]

9/16/91 --- PRE-TRIAL CONFERENCE BEFORE
JUDGE LOUIS F.OBERDORFER
REPORTER: T. DOURIAN (CLV)
[ENTRY DATE/ 09/18/91]

9/16/91 376 MEMORANDUM AND ORDER BY
JUDGE LOUIS F. OBERDORFER
GRANTING MOTION OF DEFEND- ANT ON
LIMITATION OF DAMAGES; (N) (CLV)
[ENTRY DATE 09/18/91]

9/16/91 377 ORDER BY JUDGE LOUIS F.
OBERDORFER: GRANTING MOTION
OF DEFENDANT TO COMPEL PRO-
DUCTION OF TAX RETURNS;
DIRECTING PLAINTIFF TO PRO-
VIDE CERTAIN DOCUMENTS AND
TO SIGN INFORMATIN AUTHORI-
ZATION FORMS BY 9/20/91;
DIRECTING DEFENSE COUNSEL
TO USE DOCUMENTS ONLY FOR

TRIAL IN THIS CASE; (N) (CLV)

[ENTRY DATE 09/18/91]

9/24/91 378 ORDER BY JUDGE LOUIS F. OBERDORFER: DENYING MOTION FOR A JUDICIAL ESTOPPEL AGAINST DEFENDANT'S CHANGE OF POSITION ON THE QUESTION OF VO'S PRESENCE IN THE STATION, AND, UNDER FRCIVP 56(F) FOR FURTHER DOCUMENT DISCOVERY, INTERROGATORIES AND TESTIMONY BY SUN PESONNEL [358-1] BY THANH VONG HOAI; DENYING PLAINTIFF'S FIRST, SECOND, FOURTH AND FIFTH REQUESTS TO AMEND COURT'S PRETRIAL ORDER; GRANTING IN PART AND DENYING IN PART PLAINTIFF'S THIRD REQUEST TO AMEND

COURT'S PRETRIAL ORDER;
RETAINING UNDER ADVISEMENT
DEFENDANTS' SUMMARY JUDG-
MENT MOTION ON THE ISSUE OF
EXEMPLARY DAMAGES; RESERVING
FOR TRIAL DEFEND-
ANT'S MOTION TO ADMIT COM-
PUTERIZED RECORDS; GRANTING
PLAINTIFF'S ORAL MOTION TO ADMIT PERCY
PETTAWAY TO
WITNESS LIST; GRANTING
DEFENDANTS' MOTION TO ADD
MANU VAKHARIA TO WITNESS
LIST. (N) (MON)

9/24/91 379 ENTERED IN ERROR MOTION BY
PLAINTIFF THANH VONG HOAI
FOR THE ADDITION OF A WIT-
NESS, RICHARD K. AGNEW TO
BE ADDED TO THE LIST OF
WITNESSES, ATTACHMENT (CLV)

[ENTRY DATE 09/27/91][EDIT
DATE 09/27/91]

9/24/91 380 NOTICE TO TAKE DEPOSITION
BY PLAINTIFF THANH VONG HOAI OF MAN-
HARLAL VAKHARIA
ON 9/27/92 (CLV) [ENTRY
DATE 09/27/91]

9/24/91 381 MOTION BY PLAINTIFF THANH
VONG HOAI FOR LEAVE TO FILE MOTION TO
ADD WITNESS,
EXHIBIT (MOTION) (CLV)
[ENTRY DATE 09/27/91]

* * * *

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA

90-7170 [STAMP]

APPEAL FROM THE DISTRICT COURT

Bin # 26,4

Briefs Sent: 4-9-91

Thanh Vong Hoai, et al.,

Appellant

Thanh Van Vo, et al.

Popular Name: [blank]

Number of Case/Order Below: 89-02397

Case Type: CV US.

JS-34 Yes

Judge Below: Oberdorfer 9053

Date of Judg./Order: 10-02-90 (EOD 10-4-90)

USDC Offense/Nature of Suit Code: 3440

Date Docketed: 11/19/90

Notice of Appeal Filed: 11-01-90

U.S. Mag:

FINANCIAL

USDC

COUNSEL: APPELLANT/PETITIONER	TYPE
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COUNSEL: APPELLEE/RESPONDENT	TYPE
Robert J. Pleshaw Law Office of Robert J. Pleshaw 1510 H St., NW #400 Washington, DC 20005 202/393-8100	EC
Sun Refining & Marketing Co., J. Gordon Forester, Jr., Geoffrey Wagner & Joseph Zulli J. Gordon Forester, Jr. 452-1400 Greenstein DeLorme & Luchs,P.C. 1620 L St. NW, Suite 900 Washington, DC 20036 Jones, Day, Reavis & Pogue; Millard F. Ottman, David C. Roseman Francis X. Markey 202-879-3939 Jones, Day, Reavis & Pogue 1450 G St., NW Washington DC 20005-2088 [by hand: Brian P. Maschler - Pro Hac Vice	3683 2311

ADDITIONAL COUNSEL FOR SUN REFINING
Stephen H. Abrams (202) 452-1400

same address ans [sic] J. Gordon Forester, Jr.

DATE	FILINGS-PROCEEDINGS
(J) 11-19-90	Copy of notice of appeal and docket entries from Clerk, USDC (n-4)
(J) 11-19-90	Order 86-6: Initial submission and procedural motions due 12-18-90; dispositive motions due on 1-02090. Docketing statement was mailed to counsel.
(J)11-19-90	Docketing fee paid in District Court on 11-1-90.
(V)11-30-90	2-Appellants' docketing statement - (m-21)[15]
(V)11-30-90	Letter from appellees' counsel objecting to appellant's docketing statement - (m-30)[15]
(V)11-28-90	2-Appellees' (Sun Refining & Marketing Co., J. Gordon Forester, Jr., Geoffrey

Wagner & Joseph Zulli) certificate as to parties, etc. - (m27)[15]

(V)12-13-90 1-Praecipe from attorney Stephen H. Abraham advising of change of address - (15)

(V)12-18-90 2-Appellants' initial submission - (m-18)[15] Def Apx N

(V)01-04-91 2-Appellants' supplement to the statement of the issues to be raised on appeal - (m-03)[15]

(S)01-10-91 Clerk's Order, sua sponte, that this case is scheduled for oral argument on 05/13/91 at 9:30 a.m. before Circuit Judges Edwards, Buckley and Randolph. The following schedule shall apply: Appellants' Brief & Appendix -02/13/91; Appellees' Brief

- 03/29/91; Appellants' Reply-05/13/91.

(S)01/10/91 Clerk's Order- sua sponte that this case is scheduled for oral argument on 05/13/91 at 9:30 a.m. before Circuit Judges Edwards, Buckley and Randolph. The following schedule shall apply: Appellants' Brief & Appendix -02/27/91; Appellees Brief-03/29/91; Appellants Reply-04/12/91.

(H)02/05/91 5-Appellant's revised and consolidated statement of the issues to be raised on appeal. (m-26).

(H)02/27/91 15-APPELLANT'S BRIEF (m-27)[BIN:]

(H)02/27/91 7-JOINT APPENDIX (VOL I).

(H)02/27/91 7-JOINT APPENDIX (VOL II.

(H)02/27/91 7-JOINT APPENDIX (VOL III).

(V)03-28-91 15-APPELLEES' (Sun Refining & Marketing Co., J. Gordon Forester, Jr., Jeffrey [sic] Wagner & Joseph Zulli) BRIEF - (m-28)

03-29-91 APPELLEES' (Jones Day Reavis & Pogue, Millard F. Ottman, Jr., & David C. Roseman) BRIEF - (m-29)

(V)04-01-91 7-JOINT APPENDIX - Volume IV: Statutes and Regulations (m-29)

(V)04-01-91 15-ERRATA TO APPELLANT'S BRIEF - (M-28)

(M)04-12-91 15-APPELLANTS' REPLY BRIEF (to Appellees Jones, Day, etc. brief)(m-12)[25]LODGED

(M)04-12-91 15-APPELLANTS' REPLY BRIEF (to Appellees' Sunoco, etc. brief)(M-12)[8] LODGED

(M)04-17-91 5-Appellants' motion to file extra reply brief of 20 pages to reply to second opposition by appellees (m-17)[8]

(M)04-17-91 5-Appellee's (Thanh Van Vo) notification that he will not file a brief or present oral argument [11]

(Z)04-24-91 Clerk's order that the following times are allotted for oral argument: Appellant - 15 minutes and Appellees - 15 minutes. Form 72 due May 1, 1991.

*(N)4-19-91 Per Curiam Order tha [sic] teh [sic] motion to file extra reply brief of 20 pages to reply to second opposition by appellees is denied. The Clerk is

directed to return the lodged brief.

(N)04/25/91 1-CERTIFICATE OF SERVICE (SUPPLEMENT)

(Z)4/29/91 Per Curiam order that appellants' motion in the nature of a Petition for Mandamus to the Clerk, or in the alternative, for reconsideration pursuant to Local Rule 7(g)(3) be denied.

(H)05/06/91 5-Appellee's motion for leave to present additional oral argument (m-06-[8].

(M)05-07-91 5-Appellants' opposition to appellees' motion for leave to present additional oral argument (m-7)[8]

(N)05-09-91 Per Curiam Order that appellees' motion for leave to

present additional oral argument and the opposition thereto, it is Ordered that the motion is granted and two counsel may present argument for the appellees'.

(M)05-13-91 5-Appellant's notice of new related case [No. 91-7070)(p-10)[8]

(M)05-13-91 5-Appellant's mtoion [sic] to supplement appendix (p-10) [8]

(M)05-13-91 15-SUPPLEMENTAL INDEX (VOL V) (p-10) [8] LODGED

(Z)05-13-91 ARGUED before Edwards, Buckley and Randolph, Cjs. On motion of J. Gordon Forester, Jr., Brian P. Maschler, a member of the Supreme Court of California, was allowed to argue pro hac

vice for appellees, Jones, Day, Reavis & Pogue, et al.

(M)05-15-91 5-Letter from counsel for appellant pursuant to FRAP 28(j) advising of additional authority (m-15) [25]

(Z)5-16-91 Per Curiam order that Appellants' motion to supplement appendix is denied and the Clerk is directed to return the lodged supplemental appendix. HTE, JLB, ARR

(M)05-17-91 5-Appellee's (Sun Refining) motion for leave to file a post argument brief on jurisdiction (m-17) [8]

(M)05-17-91 APPELLEE'S SUPPLEMENTAL BRIEF (m-17) [8] LODGED

(Z)5-28-91 Per Curiam order that the motion of Appellees for leave to file a post argu-

ment brief on jurisdiction be denied. The Clerk is directed to return the lodged brief to counsel.

(M)05-28-91 5-Appellants' response to motion for leave to file additional brief (m-28) [8]

(H)06=06-91 4-Transcript of Oral Argument [25]

(H)06-07-91 5-Appellant's emergency motion for expedition and stay (p-07) [8].

(cb)6-11-91 Per Curiam Order for the Court that the motion for expedition and stay is denied; Edwards, Buckley and Randolph, CJs.

(cb)6-11-91 Opinion for the Court filed by Circuit Judge Edwards.

(cb)6-11-91 Judgment for the Court that

	the judgment of the District Court appealed from in this caused [sic] is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.
(cb)6-11-91	Mandate Order
(M)06-17-91	5-Appellees' (Sun Refining et al.) bill of costs(m-17) [9]
(M)06-26-91	5-Appellees' (Jones, Day et al) bill of costs (m-25)[9]
(M)07-01-91	5-Appellants' opposition to appellees' (Sun Refining etc.) bill of costs (m-1) [9]
(D)07-11-91	20-Appellants' Petition for Rehearing En Banc (m-11)[1]
(D)08-06-91	Per Curiam Order: Appellants' suggestion for rehearing en banc has been

	circulated to the full court. No member of the court has requested the taking of a vote. The suggestion is denied. (Mikva, Wald, Edwards, R.B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson & Randolph, CJs)(by Clerk)
(H)08-13-91	5-Appellee's (Sun Refining) motion for attorney's fees (m-13) [1].
(H)08/13/91	5-Appellant's response to motion for attorney's fees (m-23) [1]
(H)09/26/91	Per Curiam Order that appellee's motion for attorney's fees is denied (Edwards, Buckley and Randolph, Circuit Judges).